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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 668

THADDEUS B. TAYLOR,
Petitioner,

vs.

STATE OF MICHIGAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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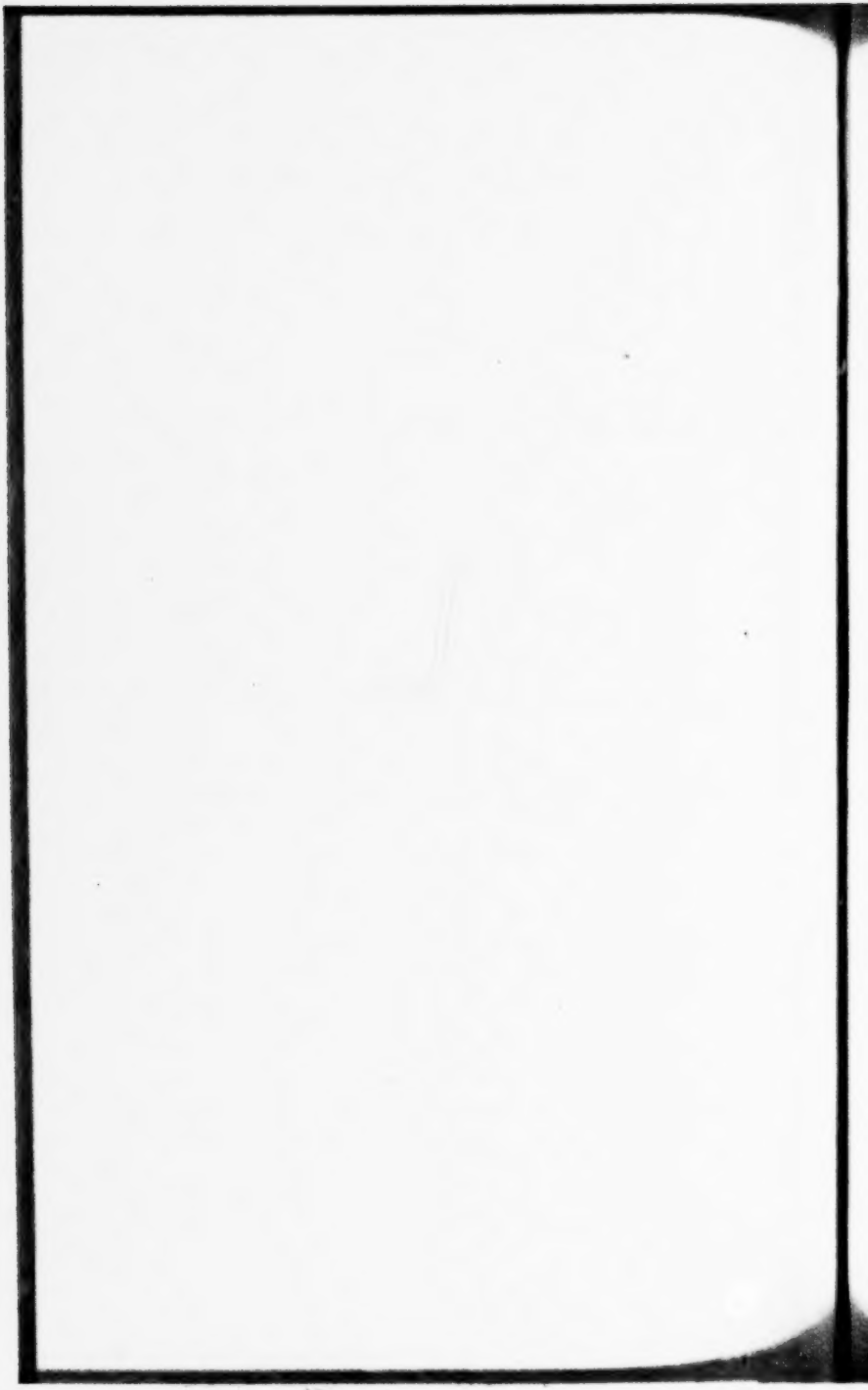

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THADDEUS B. TAYLOR,
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vs.

STATE OF MICHIGAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Michigan entered in the above entitled action.

OPINIONS BELOW

The decision of the Supreme Court of Michigan is reported as 367 Mich. 256, and it appears as (App. K; 7a) to this petition. Two opinions were filed. One to reverse and one to affirm the judgment of the court of claims.

"R" refers to printed record, the joint appendix below, nine copies of which are on file herein.
"A" refers to appendices to this petition.
"C. L." refers to Michigan Compiled Laws.
"M. S. A." refers to Michigan Statutes Annotated.
Emphasis in petition is ours.

JURISDICTION

The majority and dissenting opinions of the Michigan Supreme Court were filed September 7, 1962. Judgment of the court was entered September 7, 1962 (App. L; 30a). A timely application for a rehearing was filed and denied November 5, 1962 (App. M; 31a). The jurisdiction of this court is invoked under 28 *U. S. C.*, Sec. 1257 (3), since the validity of the judgment of the court below is drawn in question and that the plaintiff has been denied equal protection thereby, which is repugnant to Article XIV, Sec. 1 of the *Constitution of the United States.*

QUESTIONS INVOLVED

1. Is the judge of the Superior Court of Grand Rapids of the same judicial class as the circuit judges, in the administration of law in the State of Michigan?

The answer of the trial judge was "yes."
The Michigan Supreme Court did not hold to the contrary.

2. Can an exemption or privilege granted by the Constitution of the State of Michigan to the Circuit Judges as in Article XVI, Sec. 3, be denied to another judge who is equally of the same class, when such judge is not specifically named in the immunity or exemption, without violating Sec. 1, Article XIV of the Constitution of the United States?

3. Was the holding of the majority opinion in the court below in violation of Sec. 1, Article XIV of the Constitution of the United States, that holding being a judicially enforced exclusion of the plaintiff from the benefits of a constitutional grant of immunity, from the restrictive provisions of Article XVI, Sec. 3 of the Michigan Constitution, to a class of which the plaintiff was a member?

4. Can the Michigan Supreme Court by its decision which is claimed to be based on state law as distinguished from Federal law, the force and effect of which decision is to deny to the plaintiff, the same and equal benefits

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given to a class of which the plaintiff was a member, without violating the guaranty of Sec. 1, Article XIV of the Constitution of the United States, and the decisions of this court, that all members of the same class must be treated alike?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article XIV, Sec. 1. The Constitution of the United States.
2. Article VI, Sec. 1. Michigan Constitution of 1850.
3. Article XVI, Sec. 3. Michigan Constitution of 1908.

STATUTES

1. Act 49, P. A. 1875, of Michigan, being C. L. 1948, 727.1-727.35 M. S. A. 27.3611-27.3648

STATEMENT OF THE CASE

The Superior Court of Grand Rapids was created by virtue of Act 49, *P. A.* 1875, *C. L.* 1948, 727.1-727.35, *M. S. A.* 27.3611-27.3648. This was in pursuance of the authority vested in the legislature by Article 6, Sec. 1 of the Michigan Constitution of 1850 (App. B; 1a).

The plaintiff was the duly elected and serving judge of said court from November 12, 1932 to May 4, 1959, when he retired having attained the age of more than seventy years. The elective terms are for six years. The Circuit Judges and the Judge of Superior Court are elected at the same primary and general election.

The annual salary to be paid to the judge of said court was fixed by Sec. 6, *C. L.* 1948, 727.6; *M. S. A.* 27.3616 (App. D; 2a) which provided as follows:

> "The judge of said Superior Court shall receive from the treasury of the State of Michigan the same annual salary as may be payable to Circuit Judges" • • •.

The above provision of law has never been changed and is effective at this time, eighty seven years later.

The salary to be paid to the Circuit Judges is fixed by Sec. 602.58, *C. L.* 1948; *M. S. A.* 27A555, Revised Judicature Act of 1961.

By successive legislative amendments the annual salary of circuit judges was increased from $6000.00 in 1941 to $7000.00; in 1949 to $9000.00; and in 1954 to $12,500.00. The defendant's administrative officers refused to pay to the plaintiff beginning with the effective date of said amendatory acts "the same annual salary as was paid to circuit judges (R. 15a)." This refusal was based upon the claim that to pay to the plaintiff the same annual salary would in effect be in violation of Article 16, Section 3 of the *Michigan Constitution* (App. C; 1a) in that an increase in plaintiff's salary would thereby occur in term.

From 1941 to May 4, 1959, the end of plaintiff's term, the State of Michigan therefore paid to the plaintiff $28,977.47 less than was paid to the circuit judges during said period (R. 15a). It was for this sum that a claim was filed in the Michigan Court of Claims, wherein and upon hearing the trial judge entered judgment for the plaintiff of $39,190.58 (R. 104a). From this judgment the defendant appealed to the Michigan Supreme Court. The case was presented January 3, 1962, and on September 7, 1962, the court by a divided opinion reversed the judgment of the Court of Claims and ordered said judgment set aside (App. K; 7a) Plaintiff made application for rehearing which was denied November 5, 1962 (App. M; 31a).

Plaintiff in the brief filed in the court below under "Questions Involved" submitted to the court for consideration, involving Federal law, 3 questions (App. N; 32a). In particular, it was the claim of the plaintiff that the Superior Court of Grand Rapids and the Judge of said court were of the same judicial class as the Circuit Court and Circuit Judges, and being so that the judge of said court was thereby included within any immunity, grant or privilege given to the circuit judges by the exception of Article 16, Sec. 3 of the *Constitution of the State of Michigan* (App. C; 1a).

Plaintiff claimed that a denial to the plaintiff on the basis of any asserted defense of the defendant would be a denial to the plaintiff of equal protection within the mean-

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ing of Article XIV, Sec. 1 of the *Constitution of the United States* and therefore would be in violation of said Article.

Plaintiff further claimed that no "express authoritative enactment" had at any time been passed during term which had increased the salary to a greater sum than the sum provided in Sec. 6, to-wit: "The same annual salary as may be payable to Circuit Judges."

The trial judge (R. 76a) and the minority opinion in the court below held that no salary could be paid to the judge of Superior Court except by the operation and effect of Sec. 6 of Act 49, *P. A.* 1875, C. L. 1948, 727.6, *M. S. A.* 27.3616 and that by authority of that Act alone was the treasurer of the State of Michigan authorized to pay a salary to the Judge of Superior Court and held that a statute which fixed a public officer's salary at the time of his election, if such law fixes a sum, or a standard or basis of computation whereby compensation may vary in amount during term was not in violation of Article 16, Sec. 3 of the *Michigan Constitution* (App. C; 1a), and held that the judgment of the court of claims awarding to plaintiff the salary unpaid to him should be affirmed.

The trial judge found and determined that the judge of the Superior Court was of the same judicial class as the Circuit Judges (R. 71a, 77a). The majority opinion of the court below does not hold to the contrary.

REASONS FOR GRANTING THE WRIT

1. A personal federal right has been denied the plaintiff.
2. The precise questions in this petition have never before been presented to this court. This results from the immunity ("except circuit judges") granted to the Circuit Judges of Michigan in Article 16, Sec. 3 of the *Michigan Constitution,* which is unique, in that our search has not disclosed a like exemption in the Constitution of any other State (App. C; 1a).
3. By the force and effect of Act 49, *P. A.* 1875 and subsequent legislative acts the Superior Court of Grand Rapids and the judges thereof are made a part and member of the same judicial class as the Circuit Courts

and Circuit Judges, in the administration of law in the State of Michigan.

4. The Michigan Supreme Court in its decisions has declared that the Superior Court of Grand Rapids and Courts of similar creation, by virtue of the same constitutional provision, are of the same class as the Circuit Courts.

5. The Michigan Supreme Court has declared that courts having powers and jurisdictions similar to the Superior Court of Grand Rapids were State Courts, the judges State officers, and that its judges exercised the powers of a Circuit Judge.

6. The majority opinion is in conflict with Article XIV, Sec. 1 of the *Constitution of the United States* and with the highest courts of other states, while the minority opinion is in accord with such decisions. The majority opinion is without any fair or substantial support. There is not cited a single authoritative judicial decision upon like or similar facts of any court, either state or federal, to support its conclusions. The majority opinion did not find or state that any legislative act had been passed fixing the salary of the judge of the Superior Court which was in conflict with the *Constitution of the State of Michigan,* nor did the majority opinion "lay its finger" upon an "express authoritative enactment" increasing the salary of the judge of Superior Court which was prohibited by the *Constitution of the State of Michigan.*

7. The Attorney General of the State of Michigan admits that no legislative act fixing the salary of the Judge of Superior Court has been passed, which the *Constitution of the State of Michigan* prohibits.

PRESENTATION

The right of the plaintiff not to be discriminated against was a personal federal right. This right was specifically set up in the original claim filed in the Michigan Court of Claims (R. 8a, 9a, 12a, 25a). It was specifically submitted to the Michigan Supreme Court in the brief of the plaintiff

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erein (App. N; 32a). It therefore affirmatively ap-
hat not only was a federal question presented for
n, but that decision thereon was necessary for a
ination of the case, and could not be disposed of
upon other grounds. This plaintiff has complied
e rule of necessity as stated by this court. *Ward*
e County, 253 U. S. 17, page 22.

Eustis vs. Bolles, 150 U. S. 361;
Leathe vs. Thomas, 207 U. S. 93, page 98.

Vard vs. Love County, supra, this court stated, page
U. S.:

"Whether the right was denied or not given due
cognition by the Supreme Court is a question as to
hich the claimants were entitled to invoke our judg-
ent, and this they have done in an appropriate way. It
erefore is within our province to inquire not only
hether the right was denied in express terms, but
so whether it was denied in substance and effect,
by putting forward non-federal grounds of decision,
at were without any fair or substantial support."

majority opinion of the court below is without any
r substantial support." The opinion disregards ad-
ed cases of long standing which support the claim
plaintiff. The majority opinion disregards the rule
igan as it exists. And in so refusing the majority
does not bring forward *a single adjudicated case*
same or similar facts to support its opinion. Against
ilure the minority opinion with citation of author-
correctly stated the rule of law, as applicable to
ts in this cause.

court therefore properly may and should take juris-
of this cause. The court below refused to pass
timely alleged and submitted question of "equal
ion." In deciding the cause on other grounds the
y its action excluded the plaintiff from the benefits
l to a judicial class of which the plaintiff was a
r. Such action of the court below is of itself a
of "equal protection." The plaintiff has not claimed
e classification of circuit judges in Article 16, Sec.

3 of the *Michigan Constitution* is in violation of the *Federal Constitution*. That question was not necessary to a determination of the cause. Plaintiff's claim was that he as Judge of the Superior Court was a judicial officer of the State of Michigan of the same class as the circuit judges and that any immunity, grant, privilege or benefit accruing to the circuit judges by virtue of the exception (except circuit judges) in Article 16, Section 3 of the *Michigan Constitution* (App. C; 1a) could not be denied to the plaintiff who was equally of the same class.

The evidence to support this claim of the plaintiff is found in the legislative act creating the Superior Court, in subsequent legislative enactments and in the decisions of the Michigan Supreme Court.

The words "of the same class" have been construed by the court below and this court to mean in substance "groups of persons engaged in the same character of work or having common characteristics or attributes."

The intent of the Michigan legislature to create a court of the same class as the circuit courts found expression in Act 49, *P. A.* 1875, *C. L.* 1948, 727.1-727.35; *M. S. A.* 27.3611-27.3648. The authority to create the court was given by Article 6, Sec. 1 of the *Constitution* of 1850 (App. B; 1a).

Therein, the legislature directed, as to the Superior Court:

1. It should be a court of record.
2. Circuit judges could be assigned to sit in the court.
3. The judge was to be paid by the state "the same annual salary as may be payable to circuit judges" (App. D; 2a).
4. The same filing fees are to be paid in each court. *M. S. A.* 27A 2528 Revised Judicature Act 1961.
5. The jurisdiction in civil actions was made concurrent with the circuit court of Kent County and exclusive jurisdiction as to criminal cases (App. E; 2a).

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6. The court was given power to issue all writs and processes and to do all acts which the circuit courts of the state in like cases could do (App. F; 4a).

7. The practice and proceedings are the same as in circuit courts (App. G; 4a).

8. There are four annual terms, the same as in circuit courts.

9. Appeals from the Superior Court are the same as from the circuit courts to the Supreme Court (App. H; 5a).

10. The Court is subject to the rules and control of the Supreme Court, the same as the Circuit courts (App. G; 4a).

11. Civil cases either law or equity, commenced in the Circuit Court of Kent County may be removed to the Superior Court if either party is a resident of the City of Grand Rapids (App. I; 5a). (It is the only court in Michigan exercising this power (R. 75a). Approved by Michigan Supreme Court in *Wood vs. Adsit*, 105 Mich. 378).

12. Process of the Superior Court may be served any place in the State of Michigan that process of the Circuit Court of Kent County may by law be served (App. F; 4a).

Denison vs. Smith, 33 Mich. 155, page 159.

13. The Kent County jury commission is appointed by the Governor upon recommendation of the Judge of Superior Court and Circuit Judges of Kent County. This commission selects the jurors for service in both courts.

Act 505, *Local Acts* 1903, Michigan.

14. The fees of jurors who serve in the Superior Court are paid by Kent County as are Circuit Court jurors.

15. The judge of the Superior Court is given the same authority to sit in grand jury proceedings as a Circuit judge.

C. L. 1948, 767.3; *M. S. A.* 28.943.

In the judicial process the judgments, orders and decrees of the Superior Court are of the same effect and enforceable in the same manner as are those of the circuit courts and by virtue of the same laws and rules. By the provisions of Article 7, Sec. 1 of the *Michigan Constitution* of 1908, the words "municipal courts" could now be omitted from Act 49, *P. A.* 1875.

ARTICLE VII.

Judicial Department

JUDICIAL POWER. Sec. 1. The judicial power shall be vested in one supreme court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house.

The Superior Court is a Constitutional court created by express authority of the *Constitution* of 1850 (App. B; 1a). The Michigan Supreme Court has declared the Superior Court and courts created by the same Constitutional authority to be of the same judicial class as a circuit court.

In 1873 by authority of the same Constitutional provision the legislature created the Superior Court of Detroit, Act 59, *P. A.* 1873. That Act contained 22 sections. Two years later in nearly identical provisions and in 22 sections the legislature created the Superior Court of Grand Rapids. Speaking of the Superior Court of Detroit, the Michigan Supreme Court said: *Wyandotte Rolling Mills vs. Robertson,* 34 Mich. 428, page 429

> "For many years it has been the clear policy of the state to secure uniformity in all tribunals *of the same class* in all substantial matters of practice, and this is discoverable not only in legislation but in the Constitution. As promotive of this policy and to erect a

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guard against the discordance to be naturally expected if each tribunal were left to establish its own code of rules, it was ordained by the constitution that one tribunal, and that, the court of last resort, should by general rules establish, modify and amend the practice in the circuit courts. Art. VI, Sec 5. The same idea has been often and in various ways acted upon by the legislature, and in many instances the end has been achieved by specific regulations on particular points. Among the provisions giving power to the Supreme Court to make rules for the circuit courts and other courts *of the same class,* like the Superior court of Detroit, we cite the following: (citing sections of C. L. 1871) * * *."

Page 431:

"In regard to the jurisdiction, so far as it goes, and the general right to employ the means necessary to effectuate it, the law places the Superior Court on the same footing with the circuit courts."

Page 432:

"As respects civil jurisdiction the superior court is a tribunal of the same class as the circuit courts. There are no limitations upon its powers, or any enactments affecting its action, to impeach the analogy necessary for our present purpose. The nature of the subjects of its jurisdiction, so far as the jurisdiction extends, is the same. It is a court of original jurisdiction, proceeding according to the course of the common law. It is a court of record, and cases are removable from it to this court by writ of error and appeal as from the circuit courts."

Every word of the above quotation applies to the Superior Court of Grand Rapids, and was quoted in the following case.

In *Nichols vs. Superior Court Judge* (1902), 130 Mich. 187, pages 191-192, in this case the court construed the act creating the Superior Court of Grand Rapids, page 191. "The act gives such court original and exclusive

jurisdiction over all criminal proceedings committed within the corporate limits of the city, with certain exceptions, and power to issue all lawful writs and process, and to do all lawful acts, which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the circuit courts of this State, within their respective jurisdictions, may in like cases issue and do by the laws of the State of Michigan. Under this law the Superior Court is subject only to the control of the Supreme Court. It is governed by the same rules of practice as the circuit courts. Appeals are taken from it to the Supreme Court. In short, it is subject to the mandate of this court in precisely the same manner and to the same degree that the circuit courts are.

This act is similar in its provisions to the act establishing the Superior Court of Detroit. This court held that: (The court then cites the quotation above from *Wyandotte Rolling Mills vs. Robinson*), and on page 197, "it (the legislature) did choose to give it all the powers which were conferred by the Constitution upon the circuit courts in all those matters entrusted to its jurisdiction."

Attorney General vs. Renihan, 184 Mich. 272.

In this case the court was construing Article 7, Secs. 1-17 and Sec. 20 of the *Michigan Constitution* of 1908 as to the power of appointment of a judge of Superior Court to fill a vacancy. Page 279, the court queried, "In naming certain courts in Sec. 17 that should be courts of record, did they intend to exclude from that class which had been or might be created by the legislature, when by Sec. 1 it had been declared that the judicial power should be vested in certain named courts and such other courts of civil and criminal jurisdiction inferior to the Supreme Court as the legislature may establish by law. To ask the question is to answer it in the negative," and on page 280, "The judge is a State officer."

In *Recorders Judge vs. Circuit Judge*, 347 Mich. 567. The Circuit Court in this case attempted to review a proceeding in the Recorders Court. The Supreme Court issued a writ of prohibition, stating, quoting from, *Detroit vs. Wayne Circuit Judge*, 233 Mich. 356, 358:

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"The Recorders Court of Detroit was created in 1857 to succeed the Mayor's Court. In addition to its local municipal jurisdiction it was given exclusive and original jurisdiction of all state criminal cases arising within the corporate limits of the city and in the exercise of this jurisdiction it was vested with all the powers of a circuit court. It follows that in respect to its jurisdiction over state criminal cases it is not inferior to the circuit courts."

Murtha vs. Lindsay, 187 Mich. 79, page 82:

"The Recorders court is when exercising jurisdiction to try persons accused of crime under the general laws of the state, a state court, its judges exercising the powers of circuit judges."

By virtue of the foregoing cases the Michigan Supreme Court has held beyond question that the Superior Court of Grand Rapids is of the same judicial class as the Circuit Courts of Michigan.

The act creating the Superior Court of Grand Rapids directs that it shall have concurrent jurisdiction in all civil cases, with the Circuit Court of Kent County. Having concurrent jurisdiction, it is a court of the same class engaged in the same judicial work. Concurrent jurisdiction means "equal jurisdiction," a jurisdiction of several different tribunals, each authorized to deal with the same subject matter.

State vs. Sinnott, 89 Maine 35, 41 A. 1007-1008);
In re Nichols Will, 166 P. 1087, 1090, 64 Okla. 241.

In the case of *Hercules Iron Works vs. E. J. & E. Ry. Co.*, 141 Ill. Rep. 491, 30 N.E. 1050, the Illinois Supreme Court discusses concurrent jurisdiction as between a city court and the circuit courts. The court held that the legislative act had given to the courts the dignity and power of circuit courts and that the judges were to perform all duties imposed upon circuit judges and on page 498 the court defines concurrent jurisdiction.

The right of "equal protection" has been stated by this court in many cases. Therein this court has laid down

certain general principles. For a summary applicable hereto we draw upon the court's opinion in *Shelly vs. Kraemer*, 334 U. S. 1, page 14:

> "That the action of State courts and judicial officers in their official capacities is to be regarded as the action of the state within the meaning of 14th Amendment is a proposition which has long been established by this court."

Page 20:

> "State action as that phrase is understood for the purposes of the 14th Amendment refers to exertions of the state power in all forms and when that action is to deny rights subject to the protection of the 14th Amendment, it is the obligation of this court to enforce Constitutional demands."

Page 21:

> "Only recently this court had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of race and ancestry was not a legitimate exercise of the state police power but violated the guaranty of the equal protection of the laws! Oyama v. California, 332 U. S. 633. Nor may the discriminations imposed by the state courts in these cases be justified as proper exertion of state police power."

Page 23:

> "When however it is clear that the action of the state violates the fundamental charter it is the obligation of this court so to declare."

O'Donoghue vs. United States, 289 U. S. 516, 53 S. Ct. 740, 77 L. ed. 1356.

In the foregoing case this court construed the question of a reduction in the salaries of the Judges of the Supreme Court and the Court of Appeals in the District of Columbia. The court held that those courts were within the protective

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provisions of Article 3, Sec. 1 of the *Constitution of the United States* and that their salaries could not be diminished during their term of office. The court, page 549 of 289 U. S., stated:

> "Indeed the Congressional practice from the beginning recognizes a complete parallelism between the courts of the District and the District and Circuit Courts of Appeal of the United States."

Likewise the Michigan legislature has since 1875 and the decisions of the Supreme Court cited herein, have recognized the "complete parallelism" between the Superior Court of Grand Rapids and the Circuit Courts. It is the only court in the State of Michigan which exercises civil and criminal jurisdiction and powers concurrent with the circuit courts (R. 75a). Courts are classified according to their jurisdiction and the powers exercised and not by their name (R. 75a). The Probate Courts of Michigan are comparable to the Surrogate Courts of other states and the circuit courts to the superior courts and county courts of other states.

Should the defendant in this cause deny that this court has jurisdiction by claiming the determination of the Michigan Supreme Court was on an independent non-federal ground, we would direct the court's attention to

> *National Association vs. State of Alabama* (1928), 337 U. S. 449, 78 S. Ct. 1163

> "Respondent recognizes that our jurisdiction is not defeated if the non-federal grounds relied upon by the state court is without any fair or substantial support, *Ward v. Board of County Commissioners*, 253 U. S. 17, 22. It becomes our duty to ascertain, in order that Constitutional guarantees may be appropriately enforced, whether the asserted non-federal ground independently and adequately supports the judgment."

The decision of the Michigan Supreme Court, based on non-federal grounds, is by virtue of the force and effect of its judgment in violation of the 14th Amendment, Sec.

1. It is a judicially enforced exclusion of the plaintiff from the benefits of a privilege granted to a class of which he was a member. The Michigan Supreme Court has in many cases stated that the Constitutional rule of equality and uniformity is only complied with when all members of the same class are treated alike.

In Re Fox Estate, 154 Mich. 5;
Haynes vs. Lapeer Circuit Judge, 201 Mich. 138;
Peninsula Stove Co. vs. Maston, 220 Mich. 284;
Davidow vs. Wadsworth Mfg. Co., 211 Mich. 90;
Smith vs. Probate Judge, 231 Mich. 409;
In re Phillips, 305 Mich. 636.

The classification of circuit judges in Article 16, Sec. 3 of the *Michigan Constitution* was not in the exercise of the police power of the state. It does not rest upon the protection of the public welfare, safety, public health or morals.

The subject of "Equal protection" has been so frequently the subject of this court's opinion as to suggest a minimum of citation. The following will suffice:

Southern R. Co. vs. Greene, 216 U. S. 400;
Truax vs. Corrigan, 257 U. S. 312;
Smith vs. Cahoon, 283 U. S. 553;
Coope vs. Arron, 358 U. S. 1;
Hernandez vs. Texas, 347 U. S. 475.

The plaintiff in this cause, after serving for nearly twenty-seven years as a trial judge, recognizes the desirability of brevity.

IN CONCLUSION

We ask this Court to take jurisdiction. Aside from the question of "Equal protection" the record in this case discloses that the State of Michigan, disregarding the provisions expressly directing the payment to the plaintiff of "The same annual salary as may be payable to circuit judges" did in fact refuse to pay to the plaintiff that salary for nearly fourteen of the seventeen years covered by the judgment of the trial court. In those years the defendant will not deny that the plaintiff carried in nearly

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every year a greater case load than any circuit judge of Michigan and never less than second.

The trial judge, who since the rendering of his opinion in this case, has been appointed to and is presently serving as Judge of the United States District Court for the Western District of Michigan, in a thoroughly reasoned and studied opinion in concluding, stated (R. 77a):

> "All Justice, all equity, all law and particularly the true spirit of the law, conspire against a strict construction of Article 16, Sec. 3 so as to exclude a judge from its benefits who presides over court, in fact and in law of the generic classification of a circuit court."

We respectfully submit this, our petition for a Writ of Certiorari.

FRED ROLAND ALLABEN,
Counsel for Petitioner.
Business Address:
408 Federal Square Building,
Grand Rapids 2, Michigan.

APPENDIX

APPENDIX A

PROVISION OF FEDERAL CONSTITUTION INVOLVED

Article XIV.

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

PROVISION OF MICHIGAN CONSTITUTION OF 1850

Article VI.

Sec. 1. The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.

APPENDIX C

PROVISION OF MICHIGAN CONSTITUTION OF 1908

Article XVI.

Sec. 3. Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract entered into. Salaries of public officers, except circuit judges, shall not be increased nor shall the salary of any public officer be decreased, after election or appointment.

APPENDIX D

PROVISIONS OF MICHIGAN STATUTES INVOLVED

Act 49 P. A. 1875. C. L. 1948 727.1-727.35 M. S. A. 27.3611-27.3648. Sec. 6 C. L. 1948 727.1-727.35. M. S. A. 27.3616. SALARY. The judge of said superior court shall receive from the treasury of the state of Michigan the same annual salary as may be payable to circuit judges, and payable (in the same manner as are circuit judges. The judge of said court may receive such additional sum as the city commission of Grand Rapids may provide, to be paid by said city in the same manner as are city officers).

APPENDIX E

JURISDICTION OF COURT; CONCURRENT; EXCLUSIVE; APPELLATE.

Sec. 13, C. L. 1948, 727.13, M. S. A. 27.3623. The said superior court shall have original jurisdiction and concurrent jurisdiction with the circuit court for the county of Kent, in all civil actions of a transitory nature, when the debt or damage claimed is over one hundred (100) dollars in which both parties reside in the city of Grand Rapids; or in which the plaintiff or the defendant resides in the city of Grand Rapids, and service of a copy of the declaration or process by which suit is begun shall be had within said city; or in which the plaintiffs, or one of them, if there be more than one, reside in said city, and the defendants, or one of them, if there be more than one, shall be served with a copy of the declaration, or with process in said city. Said court shall also have such jurisdiction of all actions of trespass upon lands situate in the city of Grand Rapids; of all actions of ejectment for lands in said city; of suits begun by writ of attachment against non-residents, if the property attached is in the corporate limits of said city when the writ is sued out, of all equity suits in which both parties are residents of said city, or in which either party is a resident of said city, or in which the complainant or defendant shall be resident of said

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city, or in which the subject matter of such suit is situate in said city; of all foreclosure suits of land situate in said city. And said superior court shall have exclusive jurisdiction of all actions of a civil nature at law or in equity, which may be brought by or against the board of education of said city, or by or against the said city or any of its officers; and shall have exclusive appellate jurisdiction, where appeals may be made of all cases originally commenced and prosecuted in the police court of Grand Rapids, where a final judgment shall be rendered by police court in cases arising out of the breach of any provision of the charter or ordinances of said city; and exclusive original jurisdiction to issue writs of certiorari in such cases tried and determined in said police court, and determine the same, when it may be lawfully done. All the jurisdiction conferred upon a recorder's court of said city by Title VI and VII of the revised charter of the said city, and the acts amendatory thereto, is transferred to and vested in the said superior court. Said superior court shall also have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state and committed within the corporate limits of the city of Grand Rapids, except in cases exclusively cognizable by the police court or the justices of the peace of said city, and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the circuit courts of this state, within their respective jurisdictions, may in like cases issue and do by the laws of this state; Provided, That this act shall not in any way affect the jurisdiction of the circuit court for the county of Kent over any case pending in said court when this act shall take effect, nor the validity of any recognizance heretofore made to said court; and the prosecuting attorney for the county of Kent shall appear and act for the people of the state of Michigan, in said superior court, in all cases arising under the laws of this state. All indictments for offenses committed within the limits of the city of Grand Rapids which may be found and presented to the circuit court for the county of Kent, by the grand jury of said county, shall be forthwith certi-

fied and transmitted by the clerk of the circuit court to said superior court, and thereupon said superior court shall have as full and complete jurisdiction of said indictments as if the same had been originally presented to said superior court, and shall have full power to take all further proceedings thereon.

APPENDIX F

POWERS OF COURT; SERVICE OF WRITS AND PROCESS OUTSIDE CITY

Sec. 14. C. L. 1948, 727.14, M. S. A. 27.3624. Said court shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the circuit courts of this state within their respective jurisdictions may in like cases issue and do, by the laws of the state of Michigan. All copies of declarations filed for commencement of suit, writs of subpoena, all writs of execution, and other writs of process, may be served beyond the limits of said city, which may in like cases be filed in the circuit court, and authorized by law to be served outside the limits of the county.

APPENDIX G

PRACTICE AND RULES

Sec. 15. C. L. 1948, 727.15, M. S. A. 27.3625. The practice and proceedings in said superior court shall be the same as those prescribed by law for the circuit courts of this state, unless otherwise limited by this act; and the rules prescribed by the supreme court for the guidance and practice of the circuit courts shall be the rules of said superior court, so far as the same may be applicable, but the said court may have the same power for making rules for said court as is given to the circuit courts or the judges thereof.

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APPENDIX H

APPEALS; CONTROL BY SUPREME COURT

Sec. 17. C. L. 1948, 727.15, M. S. A. 27.3627. Any complainant or defendant in any cause in equity, who may think himself aggrieved by any decision, decree, or order made therein by said superior court, may appeal therefrom to the supreme court; such appeal may be taken in such like cases, and the proceedings on appeal shall be similar in all respects to those prescribed by statute in cases of appeals from circuit courts; and the supreme court may issue all writs of error, certiorari, prohibition, mandamus, and other writs directed to the said superior court or the judge thereof; as it may issue and direct to the circuit courts or the judge thereof; and shall have like superintending control over the said superior court as is given by the constitution or by law to the supreme court over said circuit courts.

APPENDIX I

REMOVAL OF CAUSE FROM CIRCUIT COURT; BOND; STAY OF PROCEEDINGS

Sec. 21 C. L. 1948, 727.21, M. S. A. 27.3631. If either party to any cause now pending in the circuit court for the county of Kent, either at law or in chancery, and within the jurisdiction of said superior court, shall, after the taking effect of this act, or if the defendant in the case of a suit within such jurisdiction hereafter commenced, at the time of entering his appearance in said circuit court, shall file with the clerk or register of said court a petition for the removal of the cause into the said superior court for the city of Grand Rapids, and shall at the same time file with the clerk or register of said circuit court, a bond to the opposite party, with sufficient surety, to be approved by a judge of said circuit court, or the circuit court commissioner of said county of Kent; and in such sum as such judge or commissioner shall direct, conditioned for the entering in said superior court, within ten (10) days, of the date of filing such petition, copies

of all papers filed and proceedings had in said cause in said circuit court, and also for his there appearing and entering special bail in the cause if special bail was originally requisite therein; and upon filing of said petition and bond, it shall thereupon be the duty of said circuit court for the county of Kent to proceed no further in the cause, and no order of said circuit court for the removal of said cause shall be requisite; and the filing of said petition and bond shall operate as a stay of all proceedings in said circuit court in said cause for said ten (10) days; and thereafter provided said cause is removed, otherwise not; but such stay shall not affect the running of any period of time provided by statute or rule for the filing of any pleading or the taking of any other proceedings by the defendant; and any bail that shall have been originally taken shall not be discharged; and the copies of said papers and proceedings being so entered and filed as aforesaid in such superior court, the cause shall then proceed in the same manner as if it had originally been brought in said court, and any attachment of the goods or estate of the defendants by the original process shall hold the goods or estate so attached to answer the final judgment, in the same manner as they would have been held to answer the final judgment had it been rendered by the court in which the suit was commenced. It shall be the duty of the clerk in said circuit court, within the time prescribed for filing said copies, to deliver to the person so seeking to remove said cause, upon being paid therefore five (5) cents per folio for making and certifying such copy, and in case the clerk of said court shall, upon demand and the payment or tender of his fees, refuse or neglect to deliver to such party certified copies of such record and proceedings, the superior court, on proof by affidavit that the said clerk has refused or neglected to deliver such copies thereof, on demand as aforesaid, shall direct and allow such record to be supplied by affidavit or otherwise as the circumstances of the case may require or allow, at any time within fifteen (15) days of the filing of such petition in the circuit court; and thereupon such proceedings, trial and judgment may be had in such superior court as if certified copies of such records and proceedings has been regularly before said

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court. Said cause shall be placed on the calendar of the superior court for trial by the clerk thereof, as soon as it is at issue.

APPENDIX J

CHANGE OF VENUE

Sec. 30. C. L. 1948, 727.30, M. S. A. 27.3640. The said "Superior Court of Grand Rapids," upon good cause shown may change the venue in any cause pending therein, upon the motion of either party in a civil cause, and in a criminal cause upon the motion of either the respondent, or the people, or the prosecuting attorney in behalf of the people, or by said court on his own motion, and direct the issue to be tried in the circuit court of Kent County, or of any other county of this state, and make all necessary rules and orders for the certifying and removing of said cause and all matters relating thereto to the court in which such issue shall be ordered to be tried; and the cause shall thereupon proceed, and the proceedings thereon shall be the same, as is now provided by law for the change of venue in any cause pending in the circuit courts of this state.

APPENDIX K

THE MAJORITY AND DISSENTING OPINIONS OF THE COURT BELOW

BEFORE THE ENTIRE BENCH, except Smith and Adams, J.J.

CARR, J.

The superior court of the city of Grand Rapids was created by, and organized pursuant to, P. A. 1875, No. 49. The Constitution of 1850 then in force and effect provided in article 6, § 1, thereof that:

"The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the Legislature in cities."

That the legislative action was taken pursuant to the permissive authority granted by the provision quoted of the then fundamental law of the State is apparent. The statute was entitled:

"AN ACT to provide for a municipal court in the city of Grand Rapids, to be called 'The Superior Court of Grand Rapids.'"

The provisions of the act were in accord with the general purpose set forth in the title. Notice of the election of the judge of the court was required to be given in the manner prescribed by law with reference to city officers. One elected to the office, under the statute as amended in 1881, entered on the performance of his duties on the first Monday of May next succeeding his election. Pursuant to amendment the clerk has been, and now is, appointed by the judge of the court for a term of two years. It is further provided by the statute, as amended, that the judge shall appoint a chief deputy clerk who shall also perform the duties of bailiff. Power of removal of said officers of the court is vested in the judge thereof. Other provisions of the statute clearly indicate the purpose of the legislature to establish a municipal court pursuant to the permissive authority granted with reference thereto by the State Constitution then in effect.

The plaintiff in the instant case served as judge of the superior court of Grand Rapids for a number of terms, retiring on May 4, 1959. Involved here is the question as to the amount of compensation that he was entitled to receive from the State during the last three of the 6-year terms served by him. The statute creating the court provided in section 6 thereof as originally enacted, and as subsequently amended, that:

"The judge of said superior court shall receive from the treasury of the State of Michigan the same annual salary as may be payable to circuit judges * * *."

The statute also authorizes additional payments to be made by the city of Grand Rapids pursuant to action of the legislative body thereof.

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The present action was instituted in the court of claims of the State, plaintiff seeking a declaratory judgment with reference to compensation that he asserted was owing to him but which State officials declined to pay. The petition was denied for reasons set forth in Taylor vs. Auditor General, 360 Mich. 146, and thereafter plaintiff's statement of claim was amended in such manner as to assert the right to a judgment for the aggregate of the alleged withheld payments. The amended claim, referring to the provision of section 6 of the act creating the superior court, above quoted, asserted that on the 10th of January, 1942, the annual salary of circuit judges, payable by the State, was fixed by legislative action at $7,000, that plaintiff was entitled to a like salary but was paid at the rate of $6,000 per annum until the first of May, 1947, when a new term began. Likewise, during such new term the annual salary of circuit judges was fixed at $9,000 but that plaintiff continued to be paid at the rate of $7,000 until the expiration of his current term of office and his entry on a new term in May, 1953. In August, 1954, the salary of circuit judges was fixed at $12,500 but the officers of the State charged with the duty of paying plaintiff's salary refused to make payments to him at the increased rate during the continuance of his then term of office. Plaintiff asserted that during the aggregate period in question he should have received from the State of Michigan the sum of $28,978.46 over and above the salary payments made to him. He sought judgment for that amount, together with interest, claiming that the officers of the State whose acts he questioned improperly determined the salary that he was lawfully entitled to receive.

The State contested plaintiff's right to the additional payments claimed by him, asserting that under article 16, § 3, of the present Constitution of the State plaintiff's salary could not be increased during a current term of office. Said section reads as follows:

"Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract entered into. Salaries of

public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

It was the contention of the defendants on the hearing of the matter in the trial court that plaintiff was not a circuit judge within the meaning of said section of the Constitution, that he was not entitled to the benefit of the specific exception made in favor of such judges, and that the payments that he claimed should have been made to him were forbidden by the Constitution. It was further pleaded by way of affirmative defenses that the statute of limitations barred all portions of plaintiff's claim asserted to have accrued prior to November 14, 1955; and that plaintiff, having failed to institute action or give notice of his intention to do so within a period of one year from the date his claimed cause of action accrued, as provided by section 11a of the court of claims act, was barred as to the portion of his said claim accruing prior to November 14, 1957.

Following a hearing the trial judge rejected defendants' claims and entered judgment for plaintiff in the aggregate sum of $39,190.58 with interest thereon at the rate of 5% per annum from November 15, 1960. From the opinion filed it would appear that the trial judge acepted plaintiff's theory that because of the nature of the jurisdiction vested in the superior court plaintiff was, from both a practical and legal standpoint, a circuit judge within the meaning of article 16, § 3, of the present State Constitution. Defendants have appealed from the judgment entered, asserting that the superior court of Grand Rapids is not a circuit court, that plaintiff during the period in question was not a circuit judge within the meaning of the term as used in the State Constitution, and that the statutory provision on which plaintiff relies that the State shall pay him the same salary as is paid to circuit judges cannot be given the force and effect of rendering inapplicable the specific prohibition of article 16, § 3.

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*C. L. 1948, § 691.111a (Stat. Ann. 1959 Cum. Supp. § 27.3548 [11½]).

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As before suggested, there is nothing in the act creating the superior court of Grand Rapids or in subsequent amendments thereto, including P. A. 1877, No. 147, indicating that the legislature of the State has at any time regarded said court as a circuit court. The title of the act of 1875 is significant in this regard, and that title has never been changed. There can be no question as to the provision of the Constitution of 1850 on which the legislature relied in providing for a municipal court in Grand Rapids. The status of said court was involved in several cases arising shortly after its organization, among which are Heath vs. Kent Circuit Judge, 37 Mich. 372; Allen vs. Kent Circuit Judge, 37 Mich. 473; Grand Rapids, Newaygo and Lake Shore Railroad Company vs. Gray, 38 Mich. 461. In the latter case the Court, after referring to article 6, §1, of the Constitution of 1850, said:

"It is also clearly apparent that each circuit, as contemplated in and provided for by the constitution, should include at least one county, and that at no time could there be more than one circuit court in a county or a circuit and a county court in the same county. It must however have been a matter considered by the members of the Constitutional Convention, engaged as they were, in the preparation of a judicial system permanent in its character, that a necessity might thereafter arise in some circuits, to relieve them from a part of their business; that in the growth and development of the State, cities would be springing up, in which, owing to the large manufacturing, mercantile and other business carried on and transacted therein, considerable litigation might be expected to arise, and that the circuit court of the county in which such city or cities were situate, would be inadequate to meet the growing demands made upon it in a prompt and satisfactory manner, and that it might therefor at some time become necessary to establish one or more courts in particular cities to relieve the circuit of a portion of the business, and that with this object and purpose in view the clause in question authorizing the legislature to establish municipal courts in cities was inserted.

"There was not however, in my opinion, any intention, by the insertion of this clause, to destroy or materially

change or affect the jurisdiction conferred upon the circuit courts, or any of them, or that such municipal courts when established, should have a jurisdiction, territorially, in any class of cases, co-extensive with the limits of the county, much less of the entire State. They were in my opinion intended for the benefit of and to meet the wants of the city in which they were established."

In Dunham vs. Tilma, 191 Mich. 688, the question arose as to whether the judge of the superior court of Grand Rapids was entitled to receive during his current term an increase in salary sought to be made by the common council of Grand Rapids. An action of mandamus was instituted against the comptroller of the city to compel him to recognize the increase. It is interesting to note that essentially the same question was raised on behalf of the plaintiff as in the instant case. Specifically it was claimed that the establishment of the superior court of Grand Rapids was not the creation of a new court "but merely a division and continuation of an already established court — the circuit court for the county of Kent — and a carving out therefrom, and a division of the jurisdiction thereof, on a territorial basis." This Court in a unanimous opinion written by Justice Person rejected the claim made, pointing out that if it were well-founded the superior court without any grant from the legislature would possess all the powers vested by the Constitution in circuit courts. It was emphasized, however, citing Nichols vs. Judge of Superior Court, 130 Mich. 187, that municipal courts derive their powers from legislative action and that without reference to the extent of such powers they still remain municipal courts. Covell vs. Treasurer of Kent County, 36 Mich. 332.

The opinion in Dunham vs. Tilma further emphasized the fact that the superior court of Grand Rapids was professedly organized as a municipal court. It was pointed out that judges of circuit courts may fill vacancies in the office of county clerk or prosecuting attorney, and that the clerk of the county is the clerk of the circuit court for such county. No claim is or can be made that the judge of the superior court of Grand Rapids has any such power of appointment, or that the county clerk is the clerk there-

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of. Dunham vs. Tilma was quoted and followed in Mooney vs. Unemployment Compensation Commission, 336 Mich. 344, in which it was held that a statutory provision granting a right of review by writ of certiorari from circuit court did not vest jurisdiction in the superior court of Grand Rapids, jurisdiction to the municipal court not having been specifically granted by the legislature.

While plaintiff herein was serving his last term as judge of superior court the legislature by P. A. 1954, No. 155, increased the salary of circuit judges to $12,500 per annum. Relying on the same statutory provision that is invoked in the present case, plaintiff instituted mandamus proceedings in this Court to compel the auditor general to issue payroll vouchers increasing his salary to conform to that paid to judges of circuit courts. Taylor vs. Auditor General, 342 Mich. 265. The defense to the action was based on article 16, § 3, of the State Constitution. In sustaining the defense it was said:

"The provision of the Constitution is clear. The legislature cannot fix plaintiff's salary by reference and thus circumvent the express constitutional inhibition against the increase of plaintiff's salary during term. He is not a circuit judge, does not come within the plainly worded exception to the constitutional inhibition, and his salary cannot be increased during term."

It would seem to be unnecessary to pursue further the discussion as to whether the superior court of Grand Rapids may be regarded as a circuit court and the judge thereof classified as a circuit judge within the meaning of article 16, § 3, of the State Constitution. The answer to the query does not lie in the similarity of powers, subject to exceptions and territorial restrictions, but basically rests on the fact that circuit courts are invested by the fundamental law of the State with powers of which they cannot be deprived by legislative action, while the extent of jurisdiction of municipal courts is a matter subject to legislative control, under constitutional provisions pertaining to such functions and to the exercise of the legislative prerogative. As appears from the language of the act creating it, from amendments thereto, and from decisions

of this Court relating to the matter, the superior court of Grand Rapids was created under the grant of authority to the legislature to establish municipal courts in cities. We cannot avoid the conclusion as expressed in prior decisions of this Court that the judge of the superior court of Grand Rapids may not be regarded as a circuit judge and as such within the exception set forth in the constitutional provision here involved. On the contrary, he is subject to the general inhibition of that provision and his salary may not be increased during his term of office on the theory that he is either legally or factually a circuit judge.

This brings us to a consideration of the question as to the practical effect of section 6 of the act of 1875 creating the superior court of Grand Rapids. That act provided, as does the amended statute, that the judge of the superior court shall receive from the State of Michigan the same annual salary as may be payable to circuit judges. It is the claim of the plaintiff in substance, which claim the trial judge apparently accepted, that this provision of the statute constitutes the establishing of a formula pursuant to which compensation of the superior court judge is to be determined from time to time. Reliance is placed on decisions from other States involving statutes fixing compensation to be paid to certain public officials on the basis of population.

Typical of such decisions is State vs. Guckenberger, 139 Ohio St. 273 (39 N.E. 2d 840). Involved there was a State statute undertaking to fix additional compensation for a judge of a court of common pleas on the basis of 3 cents per capita for the first 50,000 population of the county of residence at the time of election or appointment, as ascertained by the Federal census. It was held that a change in population would entitle the incumbent of the office in question to an increase in salary during his term if it was established by the census that the population had increased to such an extent as to authorize it. A constitutional provision against increasing salaries during terms of office was held not applicable. Of like import are Crowe vs. Board of Commissioners, 210 Ind. 404 (3 N.E. 2d 76); State ex rel. Harvey vs. Linville et al., 318 Mo. 698 (300 S.W. 1066); Puterbaugh vs. Wadham, 162 Cal. 611 (123

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P. 804). In the above cited decisions, however, it appears that no legislative action claimed as the basis for an increase in compensation during a current term of office was involved. In the case at bar the situation is otherwise. Each increase in the salary of circuit judges, from which plaintiff claims the right to benefit, was due directly to legislative action. We are not, in other words, dealing with a formula resting on the basis of a change in population, an increase or decrease in assessed valuation, or other analogous factor. If plaintiff is entitled to the various increases that he claims in this proceeding it is by virtue of the fact that the legislature spoke and that its action in so doing required the payment to him of increased compensation during his term of office. Such an increase would be as much due to legislative action as though stated in specific language.

Reliance is placed by plaintiff on the decision of the supreme court of Colorado in Blakeley et al vs. People ex rel. Madden, 104 Colo. 206 (89 P. 2d 1015). That was a proceeding in mandamus to require the payment of additional salary to the judge of the juvenile court of the city and county of Denver. For some years a salary of $4,000 per annum had been paid. On June 7, 1937, there became effective an act of the legislature fixing the salary of district judges at $5,000 per annum. By prior act of 1923 payment to juvenile court judges of a salary not less than that received by district judges was directed. Relying on said act plaintiff in the case claimed that the increase of the salary of district court judges to $5,000 automatically increased his pay to the same amount during his current term. The defendants relied on a provision of the State Constitution directed against an increase or decrease in the salary of any public officer, after election or appointment, as fixed by legislative enactment. The constitutional provision in question was adopted in 1928. Commenting thereon the majority opinion in the case deemed it reasonable to infer that the voters in adopting the amendment believed "that authorized change in salaries of district judges, when made, would work immediate like result as to the salary of the judge of the juvenile court." It would appear therefore that the Colorado court, in upholding the claim of the plaintiff that he was entitled

to the increase in salary, did so on the basis of an assumption that the people had adopted the constitutional provision after the statute had been adopted in 1923 in the belief or on the theory, that the statute would control and that the prior existing status would continue. It is significant that two members of the court dissented, expressing their reasons for dissent in the following terse statement:

"I think the court's opinion sanctions not only amendment of the Constitution by indirection and implication, but amendment by the legislature. My reason for that conclusion, to which I think no answer has been made, may be thus briefly stated: There is not a word in the Constitution about a juvenile judge or his salary. Hence if he has any salary it must be provided solely by statute. During every minute that court has been in existence the Constitution has forbidden the application of changes in salaries so fixed to persons then in office. This judge was in office when the statute was passed, hence he can not take the increase during that term."

Whether the assumption on which the majority of the members of the Colorado court apparently relied was properly made does not require discussion. It is certain in the instant case that the interpretation of article 16, § 3, of the Michigan Constitution does not involve any such consideration. The Constitution of 1850 provided in section 20 of the schedule thereof that "it shall not be lawful hereafter for the Legislature to increase or diminish the compensation of any officer during the term for which he is elected or appointed." This provision remained in force until the effective date of the present Constitution, January 1, 1909. Up to that time it was not within the power of the legislature to increase the salaries of circuit judges, or the salary of the judge of the superior court of Grand Rapids, effective during current terms of office. If we assume, as the trial court suggests in his opinion, "that Section VI of Act 49 of the Public Acts of 1875 was in the minds and intelligence of the delegates to the convention of 1908" the query naturally suggests itself why specific mention was not made in article 16, § 3, of the superior court judge. That was not done and

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there is no basis for any inference that an unexpressed inclusion was intended. The sole authority cited in support of plaintiff's position as to the effect to be given to section 6 of the act of 1875 is the holding of the majority of the Colorado court, which holding we decline to follow.

The conclusion reached on the principal questions at issue render it unnecessary to consider the arguments of the defendants with reference to the statute of limitations and the failure to observe the requirements of the court of claims act with reference to the time of notice of an intent to file a claim and the filing of such claim.

The case is remanded to the trial court with directions to set aside the judgment entered and to render judgment in favor of the defendants.

Dethmers, Kelley, Souris, concurred.

BEFORE THE ENTIRE BENCH except Smith and Adams, J.J.

BLACK, J. (for affirmance)

> "What can we know? or what can we discern,
> When error chokes the windows of the mind?"
>
> (Sir John Davies, The Vanity of Human Learning, stanza 15).

Our unintentional yet grievous error, committed in 1955 against faithfully deserving Judge Thaddeus B. Taylor (Taylor vs. Auditor General, 342 Mich. 265), really does choke the windows of some minds here. There is no other rational way to account for the presently proposed opinion for reversal of this eminently rightful judgment of the court of claims.

Finally, after 7 years of admirable patience and dogged perseverance, Judge Taylor has forced us to consider and treat that pat authority and established principle (found particularly in Blakeley vs. People, 104 Colo. 206, 89 P. 2d 1015) he has righteously relied upon ever since filing — September 29, 1954 — of his original petition for mandamus. After 3 entreaties by Judge Taylor (Taylor vs. Auditor General, supra, decided April 14, 1955; Taylor

vs. Auditor General, 360 Mich. 146, decided June 6, 1960, and now Taylor vs. State) we will have forthrightly done something at least, that is to say, this Court will have faced up to the precedent Blakeley supplies for dovetail with our own similarly snubbed case of People vs. Reigel, 120 Mich. 78. I shall refer to such principle as that which is made when the constituted legislative body ordains that the amount of salary a to-be-elected-or-appointed public officer is to receive, in whole or in part during his term, shall be determined according to a readily ascertainable "fluctuating factor." (The expression is taken from presently quoted O. A. G. 1951-52, p. 38, No. 1269).

As this point, farsing with due process, I insert a manifestly fair question: Were the presently considered Blakeley, Guckenberger, Crowe and Reigel Cases examined *at all* by the Court when the first Taylor Case was considered and decided in 1955? Although cited and stressed on each occasion (Taylor 1955 and Taylor 1960),* Blakeley in particular was ignored by majority opinion signers, so far at least as the official opinions disclose. On both occasions the Court deigned no recognition or treatment of the easily understood aphorism that legislatures may and occasionally do, with Constitutional propriety, provide for prospective and during-term escalation of the salaries of public officers by acting and enacting *prior to election for the official term in question.* And no regard (again as far as the official opinions disclose) seems to have been given that vital word "annual" which, prior to and throughout all of Judge Taylor's elective terms and continuous years of service (1932-1959), appeared in the *only statute which authorized payment to him of any salary whatever from Michigan's treasury.* A man cannot receive "the same annual salary" another receives unless he receives the same amount annually. And he assuredly does not receive the same amount annually when the other's received amount fluctuates regularly npward as his received amount remains stationary.

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*Starting on page 15, Judge Taylor's 1955 brief devoted 6 full pages to discussion and quotation of then-scorned Blakeley.

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First: Present is a fact — a *controlling* fact — which makes for unerring decision of this case if we will but let it shine through the "windows" of the judicial mind. It is that the legislature has exclusively provided, continuously for more than 85 years, that the judge of the superior court of Grand Rapids "shall receive from the treasury of the State of Michigan the *same annual salary* as may be payable to circuit judges" (See section 6 of the act of 1875 and notes of amendments, C. L. 1948, §727.6). The phrase reads now, in full (C. L. S. 1956, §727.6):

"Sec. 6. The judge of said superior court shall receive from the treasury of the state of Michigan the same annual salary as may be payable to circuit judges, and payable in the same manner as are circuit judges."

If the legislature had constitutional power to enact such a statute, and the Chief Justice carefully refrains from denial of such power, then we have before us no more than a question of statutory interpretation, with respect to which the following is submitted. The Chief Justice says:

"If plaintiff is entitled to the various increases that he claims in this proceeding it is by virtue of the fact that the legislature spoke and that its action in so doing required the payment to him of increased compensation during his term of office."

Here we agree and square off. I say the legislature *did* speak, exactly as in Blakeley and for many more continuous years prior to all of Judge Taylor's term-tenures; that by its action of 1875 and the successive statutes authorizing increases of State-paid salaries for circuit judges the legislature *did* authorize and require the payment to Judge Taylor of the correspondingly increased compensation Judge Fox awarded him in the court below.*

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*Indeed, during all his years of tenure, no statute excepting said section 6 determined the *amount* of salary Judge Taylor should receive from the State treasury.

Now let Blakeley speak. The facts are identical. All of the writing Justices — not just the majority — held to the only permissible legislative intent, arising from said section 6 (including that word "annual"). What the seven man court did differ upon, 4 to 2 with 1 Justice not participating, was the constitutional question arising from the same no-increase no-decrease provision which appears in the constitutions of Colorado and Michigan. To make our record clear upon this point I quote here the entire *dissenting opinion* of Justices Burke and Bock, which *dissent* the Chief Justice, ignoring all extant authority including Reigel, supra, would have us adopt (1019 N.R. citation):

"I dissent. I think the court's opinion sanctions not only amendment of the constitution by indirection and implication, but amendment by the Legislature. My reason for that conclusion, to which I think no answer has been made, may be thus briefly stated: There is not a word in the constitution about a juvenile judge or his salary. Hence if he has any salary it must be provided solely by statute. During every minute that court has been in existence the constitution has forbidden the application of changes in salaries so fixed to persons then in office. This judge was in office when the statute was passed, hence he can not take the increase during that term."

When Blakeley came to consideration, and for 11 years prior thereto, Colorado's constitution provided: "No law shall extend the term of any public officer, or increase or decrease his salary, after his election or appointment, as

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*Courts usually follow *majority* rather than *minority* opinions, especially when the former appear as having been the subject of greater care and are supported not only by separate and respectable opinions of complete concurrence but also by the clear weight of reasoned authority. For such clear weight and pronouncement thereof, see State vs. Guckenberger, post.

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fixed by legislative enactment" (art. 5, §30). It was shown that the salary of the office of the petitioner judge* was originally fixed, by enactment in the year 1907, at the sum of $4,000 per year; also that, prior to his election (in 1936), the salary of such office was continuously tied to that of the district judge or judges of the county by an act of 1923 providing that the judge of his court "shall receive an *annual* salary of not less than that received by the district judge or judges of such county." It was shown further that the salaries of such district judges were raised in 1937, from $4000 per annum to $5000 per annum, and that the respondent fiscal officers refused to pay the petitioner at the higher rate. The respondents relied of course, as do the defendants here, on the mentioned no-increase no-decrease provision. The majority ruled (p. 1016, 1017 N. R. citation):

"If it may be said that relator's salary was fixed in the sense of sum or amount at the time of his election, then on authority of Carlile vs. Henderson, 17 Colo. 532, 31 P. 117, and Henderson vs. County of Boulder, 51 Colo. 364, 117 P. 997, called to our attention by counsel for respondents, the contention that there was error below would be sound; and had the act of 1907 remained unchanged, the essential fixity of salary would be manifest. But in 1923, as we have seen, the legislature amended the 1907 act in the matter of the salary of the judge of the juvenile court by tying it, as to amount, to the salary of district judges. The language is, that the judge of the juvenile court 'shall receive an annual salary of not less than that received by the district judge or judges' of his county. Clearly, as we conceive, the legislature intended that the salary of the judge of the juvenile court (unless, indeed, county authorities should voluntarily pay a larger salary) shall at all times correspond with, and be not less than, that which the

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*Judge Madden, the petitioner in mandamus, held the office of judge of the juvenile court of the city and county of Denver.

state pays its district judges; and only in that sense did the act of 1923 fix the salary of the judge of the juvenile court. Until the 1923 act, the act of 1907 made full revelation as to the amount of salary of the judge of the juvenile court. But when the act of 1923 became effective the amount of such salary was ascertainable only by an examination of that act *and* whatever law fixed the amount of salary of district judges. The process of ascertainment necessarily was a continuing one; that is to say, to cognize the salary of the judge of the juvenile court at any given time, resort must be had to the law in relation to the salary of district judges then in force."

Justice Young, concurring unreservedly and specially declared his conviction this way (pp. 1017, 1018, N. R. citation):

"If the amount he [the judge] is to receive is definite and certain and fixed in dollars and cents, the officer is entitled to receive the specific amount so provided, no more and no less, regardless of any legislative change in the amount made after his election or appointment. If the compensation he is to receive depends on a contingency, as for example, upon the amount of fees he shall receive when fees are fixed and the officer is allowed to retain them, then the compensation as to the manner of its determination, is fixed, though as to the amount actually to be received it is contingent. One entering upon such an office does so with his compensation fixed though the amount he will receive in dollars and cents is uncertain." • • •

"The effect of section 30, article V is to give to the elected or appointed official a vested right to all the compensation that he may receive by virtue of the law providing for his compensation at the time of his election or appointment to office. If the law in force at that time is such that the compensation may vary by reason of the happening of reasonable contingencies, there is vested in the official the right to increased benefits that may accrue, and there is imposed upon him the burden of diminished benefits which may result as the contingencies do or do not arise."

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Now let us ascertain whether the truncated reasoning of Justice Burke's dissent accords with the weight of authority; in fact with what this Court approved many years ago. First let us examine O. A. G. 1951-1952, No. 1269, mentioned above. On that occasion attorney general Roth, later circuit judge of the 7th circuit and now a distinguished member of the bench of the United States District Court for the Eastern Division of Michigan, adopted the reasoning of Crowe and Guckenberger, both supra. Having first quoted Crowe (which Guckenberger later quoted with approval) as follows:

"In Crowe v. Board of Commissioners, 210 Ind. 404, 408 (3 N.E. 2d 76, 77), also quoted with approval in the Guckenberger Case [State, ex rel. Mack v. Guckenberger 139 Ohio St. 273, 285, 286 (39 N.E. 2d 840, 139 A. L. R. 728]), the court said:

" 'There is no merit in the contention that an increase in the salary of an officer during his term is involved. The salary was fixed before he was elected. The amount he was to receive from time to time was made to depend upon the population of the county. It is as though the statute in existence when the officer was elected had provided that he should receive $1,000 the first year and $2,000 the second year of his term. In the statute under consideration the legislature chose to make the amount of salary dependent upon population shown by the United States census. It might continue during the latter part of the term the same as before the census. It might be more if the population increased. It might be less if it decreased.' ";

attorney general Roth concluded:

"In my judgment this view is sound and would prevail in this State should the question ever reach our Supreme Court. Consequently, *so long as a salary, dependent in amount upon a fluctuating factor such as population, is provided for by a statute effective prior to election or appointment of any public officer such officer may receive salary increases due to changes of the salary factor without there being a violation of Const. 1908, art. 16, §3. Indeed, the salaries of judges of probate have been so determined for some time.*"

The reasoning of O. A. G. No. 1269 was expressly followed by Justice Kavanagh (then as attorney general) in 2 O. A. G. 1955-56, p. 726, No. 2822.* See also O. A. G. 1951-52, p. 61, No. 1284, wherein attorney general Roth held that "a majority of the jurisdictions in which the question has been decided have taken the view that such constitutional provisions [no-increase no-decrease provisions] do not prohibit automatic salary changes dependent upon future events if the laws so fixing salaries are seasonably enacted."

Let us come now to our own decision of Reigel, supra. There the defendant, once Bay county treasurer, was found guilty of embezzlement for having drawn and retained, over and above his precedently fixed regular salary, certain collection fees which the county board of

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*In O. A. G. No. 2822 the posed question was:

"Having in mind the provisions of section 3, article XVI of the Michigan Constitution, is it legally sound to fix the annual salary of an official in a different amount for each year of his term of office, effecting an increase year by year? By way of example let us suppose that the Board of Supervisors fixed the salary of an official holding a 4 year term of office at $3,000 payable during the first year of his office, $4,000 payable during the second year of his office, $5,000 payable during the third year of office, and $7,000 payable in the final year of his office."

Attorney General Kavanagh answered:

"In the case you now put, we assume that the salary is being fixed before the election or appointment of the officer. We believe that the reasoning of the prior quoted opinion applies, and that since the amount of the salary is fixed prior to his election or appointment, there is no increasing of salary within the term. Although the amount of salary actually to be received is subject to successive annual raises, the increases are fixed by the proper body before election or appointment, rather than during the period in which the office is held."

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supervisors had resolved in his favor. The board's action was taken by resolution to approve the following report:

"Your committtee on ways and means, to whom was referred the matter of the salaries of the county officers, have had the same under consideration, and would recommend that the salaries of the various county officers be as follows for the next two ensuing years: For county treasurer, $3,800, and collection fees on liquor and other taxes."

The trial judge ruled that "the effect of this resolution was to fix the salary of the treasurer at $3,800 and the collection fees of liquor taxes, given to treasurers by statute, and it was void as to the 4 per cent collection fees on taxes collected." A directed verdict of guilty followed, and the defendant appealed. This Court held, as against a typical no-increase no-decrease provision, effected by statute*:

"We are not satisfied that it [the statute] was intended to have the effect stated, and think that it was intended to prevent changes in salaries following the election of officers, before the beginning of or during their terms. We see no reason for saying that it was intended to abrogate section 527, or to affect it, except as it forbids changes during an official term. It is apparent that the amount of the salary fixed in this instance was indefinite and uncertain in a sense, because liable to be increased or diminished through variations in the amount of the collection fees. But the statute was designed to prevent repeated or untimely action by the board, and not to prohibit a method of fix-

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*1 How. Stat. §508, reading:

"The annual salaries of all salaried county officers which are now, or may hereafter by law, fixed by the board of supervisors, shall be fixed by said board on or before the thirty-first day of October prior to the commencement of the term of such officers, and the same shall not be increased or diminished during the term for which such officers shall have been elected or appointed."

ing the salary which should make the amount contingent upon the work done, and which has already been approved, provided the resolution fixing the salary should state the rule by which the amount should be determined."

The Chief Justice ignores such reasoning. He does not even mention the Reigel Case. Yet here, as in that case, the *amount* of Judge Taylor's precedently ordained state-paid compensation was "indefinite and uncertain in a sense" because it by an old and standing statute was liable to be increased, during each of his elective terms, *on account of constitutionally permitted during-term increases of the state-paid salaries of circuit judges.* (All such judges, of superior and circuit courts, are simultaneously elected for identically co-extensive six-year terms). Note especially from Reigel that the no-increase no-decrease provision did not prohibit a method of fixing the involved salary by making the amount contingent upon ascertainable future events when and if such events should occur.

The thoroughly reasoned and leading case of State vs. Guckenberger, 139 Ohio St. 273 (39 N.E. 2d 840) has guided our attorneys general to their quoted holdings. Such holdings have determined — for at least a decade — the right of many Michigan public officers to receive, as they have since received, salaries according to various fluctuating factors fixed by ahead-of-election legislation. Such legislation effects a valid legislative purpose. Guckenberger tells why (p. 843 N. R. citation):

"The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed by the Legislature during the term; that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of the present statute, albeit the compensation of the judge

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is made variable, from and after the last federal census becoming effective during his term."

Judge Fox (sitting below; since appointed to the District Court bench of the United States) propounded a visibly roguish test of the validity of such legislatively provided fluctuating factor. Citing Crowe, Guckenberger and Reigel as authority for upholding his answer, Judge Fox said:

"Let us suppose, for example, that the legislature, in 1945, passed an act which provided —

"Justices of the Supreme Court shall receive from the treasury of the State of Michigan an annual salary of $1,000 in excess of the highest salary paid to judges of the Third Judicial Circuit (Wayne county, including Detroit).

"It occurs to me that such a predetermined formula would be valid and binding under the Constitution of the State of Michigan."

Would that such a question were here, in company with this latest case of Taylor. With our sole right to compensation furnished by, and tied exclusively and precedently to the regularly upgraded salaries of the judges of the 3rd circuit, *one might politely inquire whether any seated Brother then would choose Blakeley's minority dixit over what a visibly thoughtful majority wrote.*

A hard decision, that. By Blakeley's dissent there really would be salary trouble for the Supreme Court of Michigan. Let us never forget, just as the dissenters noted in Blakeley concerning Judge Madden's office and salary, that in Michigan "There is not a word in the Constitution" requiring payment of *any* salary to Michigan Supreme Court Justices. The people seemingly forgot about the matter of our compensation when they conceived and approved the Constitution of 1908.

What really is before us? In the words of Justice Holmes' most notable dissent (Northern Securities Co. vs. United States, 193 U. S. 197, 401), "What we have to do in this case is to find the meaning of some not very difficult words." The words are "same annual salary as

may be payable to circuit judges." All we need do — this is Holmes again, same page — is "to read English intelligently."

Second: Referring to Dunham vs. Tilma, 191 Mich. 688, the Chief Justice says that "It is interesting to note that essentially the same question was raised on behalf of the plaintiff as in the instant case." Respectfully, I disagree. The same question was not raised in Dunham, "essentially" or otherwise. Dunham dealt with the specific question whether, *during and applicable to the then elective term of the superior court judge, the common council* of Grand Rapids lawfully increased *the city-paid portion of the judge's salary* (not the state-paid portion which, as we have seen, was then and there governed as to amount by said section 6). There being no extant statute tying the judge's *locally contributed portion of salary* to some "fluctuating factor," the Court properly ruled that the common council had violated the no-increase no-decrease provision of said article 16. Dunham does not even mention the state-paid portion of the judge's salary. Nor does it deal with said section 6.

Third: Throughout the opinion proposed by the Chief Justice the superior court is subtly downgraded to the status of a "municipal" court. Once indeed it may have been such, during the 19th century when the Constitution confined the legislature to establishment of "municipal" courts "in cities" (Const. 1850, art. VI, section 1). But things do change, of necessity and also by law. The corresponding section of today's Constitution, conjoined with today's municipal law, through which the territorial jurisdiction and so the burdens of the superior court continue at quickening pace to expand outward in every direction over Kent county, authorize legislative establishment and maintenance of courts "inferior to the supreme court." (Const. 1908, art. VII, section 1). The words "municipal" and "cities" were eliminated in 1908, and there is no doubt now that the jurisdiction and powers of the superior court are equal to those of our circuit courts. As in circuit, the judgments and decrees of the court are reviewable only by this Court. Provision is made for automatic transfer to it of cases which, if originally within its concurrent territorial jurisdiction, have been commenced in the

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Kent circuit (C. L. 1948, §727.21). The rules of practice and procedure prescribed for the court are the same (C. L. 1948, §727.15; Court Rule No. 1). The elective term of the judge is the same as that of our circuit judges and, if the legislature meant what it said, the state-paid salary is intendedly the same. It is a circuit court in fact which the legislature may, at any time with constitutional sanction, dub "the circuit court of Grand Rapids" rather than "the superior court of Grand Rapids."*

"The jurisdiction of the [superior] court is defined by section 13, as amended. It has original and concurrent jurisdiction with the circuit court for the county of Kent, and within its territorial limits the jurisdiction conferred is as extensive and broad as that of the circuit court." Attorney General vs. Renihan, 184 Mich. 272, 275.

CONCLUSION

This is the third and final occasion when a distinguished veteran of Michigan's judiciary will have appeared before us in effort to obtain his fully earned due. Having been burdened with the judicial power "to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the circuit courts of this state, within their respective jurisdictions, may in like cases issue and do by the laws of this state" (quotation from original and present section 13 of the act of 1875; C. L. 1948, §727.13); having borne, during the 1940's and early 1950's, quite a share (in addition to the work of his own court) of the work which, but for continued illnesses of elder Kent circuit judges, would normally have been processed by such judges, and living now in precarious health on borrowed time, Judge Taylor asks no more than what by law was

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*"The superior court of Grand Rapids is a court of record having original jurisdiction concurrent with the circuit court for the county of Kent, as provided in 3 Comp. Laws 1929, §16351." Youdan vs. Kelley, 267 Mich. 616, 619.

owing to his office from and after each of the circuit court salary increase acts of the 1940's and 1950's. Tribute to his unflagging attention to duty, and to the continuously enviable condition of his docket, has been paid regularly by the statistics and annual reports of the court administrator.* Unless appellate error — once committed — must always be denied by the nnwitting perpetrators thereof, we have no good reason to deny him the judgment which, at long last in the court of claims, he has rightfully won.

During the darkest hours of the Civil War President Lincoln wrote (August 22, 1862), to his old friend Horace Greeley:

"I shall try to correct errors when shown to be errors, and I shall adopt new views so fast as they shall appear to be true views." (Life and Works of Abraham Lincoln, "Letters II"; page 45, Centenary Edition, 1907).

A good thought for judges as well as Presidents.
I vote to affirm and therefore dissent.

Kavanagh concurred.

APPENDIX L

JUDGMENT BELOW

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN. Held, at the Supreme Court Room, in the Capitol, in the City of Lansing on the 7th day of September in the year of our Lord one thousand nine hundred and sixty-two.

Present the Honorable: Leland W. Carr, Chief Justice; John R. Dethmers, Harry F. Kelley, Eugene F. Black, Thomas Kavanagh, Theodore Souris, Associate Justices.

This cause having been brought to this court by appeal from The Court of Claims, and having been argued by

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*See 1957 report of the court administrator, p. 29, and his 1958 report, p. 43.

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counsel, and due deliberation had thereon, it is now ordered by the court, that the judgment of The Court of Claims be and the same is hereby reversed and the cause is remanded to the trial court with directions to set aside the judgment entered and to render judgment in favor of the defendants. Justices Smith and Adams did not participate.

STATE OF MICHIGAN — SS.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court at Lansing this 13th day of November in the year of our Lord one thousand nine hundred and sixty-two.

Donald F. Winters,
(SEAL) Clerk.

APPENDIX M

ORDER DENYING MOTION FOR RE-HEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 5th day of November in the year of our Lord one thousand nine hundred and sixty-two.

Present the Honorable: Leland W. Carr, Chief Justice; John D. Dethmers, Harry F. Kelley, Eugene F. Black, Thomas M. Kavanagh, Theodore Souris, Otis M. Smith, Paul L. Adams, Associate Justices.

A motion for re-hearing having been heretofore submitted herein, it is hereby, DENIED.

STATE OF MICHIGAN — SS.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court at Lansing this 7th day of November in the year of our Lord one thousand nine hundred and sixty-two.

Donald F. Winters,
Clerk.

APPENDIX N

PAGE 1 PLAINTIFF AND APPELLEE BRIEF

COUNTER-STATEMENT OF QUESTIONS INVOLVED

Part I.

1. Does the defendant-appellant admit the ten claims made by plaintiff-appellee, in his motion for judgment on the pleadings?

The trial court answered — "Yes."
Plaintiff and appellee claims that the answer is correct.

2. Is the Superior Court of Grand Rapids and the Judge of said Court of the same judicial class as the Circuit Court and Circuit Judges?

The trial court answered — "Yes."
Plaintiff and appellee claims the answer is correct.

3. Does the exception in Art. 16, Sec. 3 "Except Circuit Judges" in the constitution of the State of Michigan conflict with Art. 2, Sec. 1 of said constitution, and is it in violation of the 14th Amendment of the Constitution of

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the United States, if said exception is construed as excluding Judges of the Superior Court of Grand Rapids, from such privilege, they being of the same class as Circuit Judges?

The trial court did not discuss or answer this question. Plaintiff and appellee claims the answer should be — "Yes."

4. Was the judgment of the Supreme Court in Taylor vs. Martin, 342 Mich. 265 in violation of Art. 2, Sec. 1 of the constitution of the State of Michigan and in violation of the 14th Amendment to the Constitution of the United States, denying to said plaintiff judge, of the same class as a circuit judge, equal protection of the law?

The trial court did not answer or discuss this question. Plaintiff and appellee claims the answer should be — "Yes."

STATE OF MICHIGAN: SS.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of page 1 of the plaintiff's and appellee's brief filed in this court in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 13th day of November in the year of our Lord one thousand nine hundred and sixty-two.

Donald F. Winters,
Clerk.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No.

THADDEUS B. TAYLOR,

Petitioner,

vs.

STATE OF MICHIGAN, et al.,

Respondents.

JURISDICTION

Jurisdiction is adequately alleged except that no substantial federal question is presented.

QUESTION PRESENTED

In the view of respondents, the only question presented is:

1. Whether the Michigan Constitution in depriving petitioner as judge of the superior court of Grand Rapids of the benefit during his current term of office of an increase in salary resulting from legislative act adopted following his election, while permitting circuit judges, who are excepted from the constitutional bar, to receive the

benefit thereof constitutes invidious discrimination in violation of the equal protection clause of the 14th Amendment?

STATEMENT OF THE CASE

Petitioner is a former judge of the superior court of Grand Rapids. Presently there is but one superior court within the State of Michigan, and reference herein to the superior court refers to the superior court of Grand Rapids,[1] Petitioner instituted this action in the court of claims of the State of Michigan to recover the difference between the salary paid by the State to circuit judges during the period from January 10, 1942 to May 1, 1959, and that paid to petitioner as judge of the superior court during the same period, relying upon the following provision of section 6 of Act No. 49, PA 1875, being CLS 1956 §727.6, MSA 1959 Cum Supp §27.3616:

> "The judge of said superior court shall receive from the treasury of the state of Michigan the same annual salary as may be payable to circuit judges, * * *."

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[1]

The superior court of Grand Rapids is a municipal court of record. There are presently two other municipal courts of record in Michigan: the Detroit Recorder's Court, upon which the statute confers not only criminal jurisdiction comparable to that of circuit courts, but also civil jurisdiction both at law and in equity. CL 1948 §725.23, MSA §27.3963. However, as a practical matter, the civil jurisdiction exercised is presently limited to condemnation cases. The Common Pleas Court of Detroit was originally established as the successor to justices of the peace, but by virtue of subsequent amendment is now a court of record and has been vested with jurisdiction concurrent with the circuit court in civil actions wherein the debt or damages do not exceed $3,000. CLS 1956 §728.1, MSA 1959 Cum Supp §27.3651.

The discrepancy between the amount of salary paid to petitioner and that paid during the same period to circuit judges arose of necessity from the application of Article XVI, Section 3, of the Michigan Constitution, which provides:

> "* * * Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

Thus, while circuit judges being exempt from such constitutional bar received the benefit of increases in salary commencing upon the effective date of the statutes providing therefor, petitioner, not being a circuit judge, received the benefit of each such increase effective upon the date of commencement of his next ensuing term of office. During the period in question, petitioner served terms of office commencing on

May 1, 1941

May 1, 1947

May 1, 1953.

Petitioner was elected as judge of the superior court for those terms at an election held on the first Monday in April of the respective years. During the same period the following acts were adopted by the Michigan legislature increasing the salary of circuit judges:

Act No. 184, PA 1941, effective January 10, 1942, increasing the annual salary from $6,000 to $7,000.

Act No. 103, PA 1949, effective September 23, 1949, increasing the annual salary from $7,000 to $9,000.

Act No. 155, PA 1954, effective January 13, 1954, increasing the annual salary from $9,000 to $12,500.

From a judgment in favor of petitioner entered in the case at bar in the court of claims appeal was taken to the Michigan Supreme Court which court by a divided opinion reversed the same. *Taylor vs. Auditor General,* 367 Mich 256.

The cited opinion of the Supreme Court is the third time that this series of litigation has reached that court.

In *Taylor vs. Auditor General,* 342 Mich 265 (1955), petitioner sought mandamus to require the Auditor General to pay him a salary at the same annual rate as was being paid by the state to circuit judges following August 13, 1954, the effective date of Act No. 155, by which the salary was increased to $12,500 per annum. In denying issuance of the writ, the Michigan Supreme Court in an unanimous opinion noted that petitioner admitted that he was not a circuit judge, and held that payment to him at the increased rate provided by an act adopted by the legislature following his election was prohibited by Article XVI, Section 3, of the Michigan Constitution, above quoted. Noting petitioner's reliance upon section 6 of Act 49, PA 1875, as amended by Act No. 275, PA 1949, the opinion stated at page 267:

> "But the 1949 act makes no provision for an increase of salaries of superior court judges during term. If it should be so construed, it would run counter to the inhibition in article 16, §3. * * *."

No federal question was raised either in that action or by the pleadings in the court of claims case which resulted in *Taylor vs. Auditor General*, 360 Mich 146 (1960). However, the issue of denial of the equal protection clause of the 14th Amendment to the federal Constitution was first raised by Mr. Justice Black in his dissenting opinion 360 Mich 147, 167 et seq. Presumably an addendum to the majority opinion was thereupon drafted for the purpose of answering such contention, 360 Mich 152, et seq. The latter opinion pointed out the historical basis of that and similar clauses inserted in various state constitutions prohibiting increasing or decreasing of salaries of public officials following their election or appointment. The opinion acknowledged the resulting "actual inequality" which frequently arises even between those occupying the same office and doing the same work, but who are elected for non-simultaneous terms. The opinion concluded however that the equal protection clause of the 14th Amendment was not violated thereby.

Following the issuance of that opinion and the remanding of the case to the court of claims, petitioner amended his pleadings to allege that he was of the same general class as circuit judges and that the exception to the bar of Article XVI, Section 3, relating to "circuit judges" should be construed to include therein judge of the superior court of Grand Rapids, and that otherwise he would be deprived of equal protection in violation of the 14th Amendment to the federal Constitution. The trial court overruled various defenses raised by respondents and allowed judgment for the full amount claimed. Upon appeal, the Supreme Court, through its majority opinion, ordered the judgment entered in the court of claims set aside and the entry of judgment for respondents. In so holding, the majority rejected petitioner's contention that the placing of a construction upon the term "circuit judges" as used in the exception to the

constitutional prohibition contained in Article XVI, Section 3, against increasing of the salary of public officers following election or appointment, so as to exclude petitioner as judge of the superior court of Grand Rapids resulted in violation of the equal protection clause of the 14th Amendment.

Respondents contend that no substantial question is presented and that accordingly the petition for the issuance of writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

As held by the Michigan Supreme Court in its prior decision in *Taylor vs. Auditor General,* 360 Mich 146, 152-156, the denial to petitioner as judge of the superior court of Grand Rapids of the benefit during his current term of office of an increase in salary resulting from legislative act adopted after his election by reason of a constitutional bar from which circuit judges are excepted, does not result in invidious discrimination violative of the equal protection clause of the 14th Amendment. Respondents therefore challenge the presentation by this case of a substantial federal question.

ARGUMENT

Article XVI, Section 3, of the 1908 Michigan Constitution prohibits the increasing or decreasing of the salaries of public officers after election or appointment.[2] Circuit

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[2]

The inhibition against raising or lowering salaries does not apply to officials appointed for an indefinite term. *Haack vs. Banish,* 287 Mich 592. Nor does it bar an officer receiving an automatic change

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judges are excepted from the bar against increasing of salaries following their election.

The Michigan court has consistently held that while the jurisdiction and powers conferred upon the superior court of Grand Rapids are coordinate in many respects of those of a circuit court, nevertheless

1. The court has never held the superior court to be a circuit court, but instead

2. The superior court is a municipal court created by legislative action pursuant to Article VI, Section 1, of the 1850 constitution

> "Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities." (See Article VII, Section 1 of the 1908 Constitution)

3. Circuit courts are vested by the state constitution with jurisdiction and powers of which they may not be deprived by legislation. As distinguished therefrom, the jurisdiction and powers of the superior court are prescribed and limited by Act 49, PA 1875, being CL 1948 and CLS 1956 §727.1-727.38, MSA and MSA 1959 Cum Supp §27.-3611-27-3648.

Nor has the Supreme Court ever held the judge of the superior court to be a circuit judge.

The following cases are cited as demonstrative of the

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in salary pursuant to the provisions of an act in effect prior to his election or appointment. Opinions of the Michigan Attorney General 1951-52 No. 1284, p 61. See *Taylor vs. Auditor General*, 367 Mich 256 at 266-67 where *State ex rel Mack vs. Guckenberger*, 139 Ohio St 273, 39 NE 2d 840, is discussed.

holding of the Michigan Supreme Court upon the foregoing propositions.

Nichols v. Superior Judge (1902), 130 Mich 187, which was a petition for writ of prohibition to restrain contempt proceedings in the Superior Court. The petition filed in the Superior Court for contempt proceedings alleged that relator committed the offense of subornation of perjury in a criminal case which was being tried in that court. Motion to quash the proceedings for lack of jurisdiction has been denied. The Supreme Court in denying the issuance of writ of prohibition stated at pages 191-194:

> "The legislature is, by the Constitution, authorized to establish municipal courts of criminal and civil jurisdiction. Const. art. 6 §1. [1850] The superior court of Grand Rapids is a creation of the legislature, with such powers and jurisdiction as the legislature has seen fit to confer upon it. We must, therefore, look to the act of the legislature establishing this court to determine what power is given it over the subject of contempts. The statute is silent upon the subject, except as it is covered by the general and broad jurisdiction conferred upon the court. The act gives such court original and exclusive jurisdiction over all criminal proceedings committed within the corporate limits of the city, with certain exceptions, and 'power to issue all lawful writs and process, and to do all lawful acts, which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts, which the circuit courts of this State, within their respective jurisdictions, may in like cases issue and do by the laws of the State of Michigan,' Pub. Acts 1875, Act No. 49, §§ 13, 14 (1 Comp. Laws 1897, §§ 630, 631). Under this law the

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superior court is subject only to the control of the Supreme Court. It is governed by the same rules of practice as the circuit courts. Appeals are taken from it to the Supreme Court. In short, it is subject to the mandate of this court in precisely the same manner and to the same degree that the circuit courts are.

"This act is similar in its provisions to the act establishing the superior court of Detroit. This court held that:

"'As respects civil jurisdiction, the superior court [of Detroit] is a tribunal of the same class as the circuit courts. There are no limitations upon its powers. • • • The nature of the subjects of its jurisdiction, so far as the jurisdiction extends, is the same. It is a court of original jurisdiction, proceeding according to the course of the common law.' *Wyandotte Rolling-Mills Co. v. Robinson,* 34 Mich 428.

"See the further reasoning of the court on page 432. See, also, *People, ex rel. Covell, v. Kent County Treasurer,* 36 Mich 332.

"The power to punish for contempt is essential to the due administration of the law, and to carry out the orders, decrees, and judgments of the court. If it was the intention of the legislature to limit the jurisdiction of the court over contempts to the causes specified in section 1098, 1 Comp. Laws,—a law which was enacted long prior to the adoption of the present Constitution, and when there was only one constitutional court, viz., the Supreme Court,—it would certainly have used language appropriate to express such intention. On the contrary, it expressly confers upon the court the same powers in this respect that circuit courts possess under the Constitution. It follows that,

if the circuit courts are clothed with the power to punish for contempts, and are not limited to the cases provided for in the statute, which was enacted under the Constitution of 1835, then the respondent possesses the same power.

"• • •

"The Constitution of 1835 provided that 'the judicial power shall be vested in one Supreme Court, and in such other courts as the legislature may from time to time establish.' Const. 1835, art. 6, §1. The people were dissatisfied with the courts organized by the legislature, and, in the adoption of the new Constitution, made an important change by providing that:

"'The judicial power is vested in one Supreme Court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.' Const. 1850 art. 6 §1.

"Thus the unlimited power to create courts, given by the Constitution of 1835, was taken away by the new Constitution, and the legislature was limited to the creation of 'municipal courts of civil and criminal jurisdiction.' The reason for this important change in the organization of the courts is stated in *Streeter v. Paton*, 7 Mich. 341."

The court held that the power of circuit courts to punish by contempt was not subject to legislative limitation and concluded at pages 197-198:

"Undoubtedly the legislature has the right to limit control over contempts in those courts which are of

its own creation. *Ex parte Robinson*, 19 Wall. 510. Section 1098, 1 Comp. Laws, is first found in the Revised Statutes of 1846, and has remained without change since that time. It then applied to the courts which the legislature was authorized to create. So, if the legislature, in creating the court in question, had used any language from which it could be inferred that, in establishing it, it intended to limit its powers over contempts, it would undoubtedly be held valid. It did not choose to do so, but on the contrary, it did choose to give it all the powers which were conferred by the Constitution upon the circuit courts in all those matters intrusted to its jurisdiction."

In *Dunham v. Tilma*, 191 Mich 688, the court's writ of mandamus was sought by the then judge of the superior court of Grand Rapids to require defendant controller of the city of Grand Rapids to receive and audit for claim for the payment of additional salary voted him by the city council. The following historical background leading to the dispute there presented is stated in order to facilitate understanding of the issues involved. Section 6 of Act 49, PA 1875, the superior court act, had been amended by Act 177, PA 1905, to provide:

"* * * he shall also receive from the treasury of the city of Grand Rapids from and after May 1, 1906, such additional salary as shall be sufficient, with the sum so received from the state, to make the salary of said judge 3,500 dollars, * * *."

By Act 60, PA 1909, the salary of circuit judges was increased to $3,500 per annum, which act had the effect of terminating any authority in the city to pay additional salary to the judge of the Superior Court. Such was the

situation until the judicature act became effective on January 1, 1916. CL 1948 §681.3. That act fixed the amount of salary payable by the state to the judges of the Recorder's and Superior Court as well as to circuit judges. It also authorized the payment by the city of such additional salary to the judge of the Superior Court as the common council shall vote. CL 1915 §12141. Shortly thereafter, the city council voted to pay Judge Dunham $1,000 per year. The controller refused to pay such additional salary on the ground that Judge Dunham having been elected in April, 1915, payment thereof during his current term was prohibited by Article XVI, §3. The Supreme Court denied the issuance of its writ of mandamus to require making of such payment.

In *Dunham* it was urged upon behalf of relator that he was in fact a circuit judge. He argued that the legislature in providing for the Superior court had merely made a division of the circuit court of Kent county, carving out jurisdiction therefrom on a territorial basis. The Supreme Court in rejecting such contention, stated at page 691-693:

> "But this is not a correct assumption. The creation of the superior court was not a division of the territorial limits of the Kent circuit court, and the establishment of a new circuit court in the city of Grand Rapids. If that were the case, the superior court would necessarily, and without any grant of the legislature, possess all of the powers guaranteed by the Constitution to circuit courts, inasmuch as those powers are beyond the reach of the legislature. Section 10, art. 7, of the present Constitution provides:
>
> " 'Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this Constitution and not prohibited by law, and appellate

jurisdiction from all inferior courts and tribunals and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunctions, quo warranto and certiorari and to hear and determine the same; and to issue such other writs as may be necessary to carry into effect their orders, judgments and decrees and give them general control over inferior courts and tribunals within their respective jurisdictions, and in all such other cases and matters as the Supreme Court shall by rule prescribe.'

"This leaves to the legislature the right only to determine what causes may be instituted in the circuit courts. It permits to the legislature no control over the general powers of those courts. *Brown v. Circuit Judge*, 75 Mich. 274 (42 N.W. 827, 5 L.R.A. 226, 13 Am. St. Rep. 438); *Nichols v. Judge of Superior Court*, 130 Mich. 187 (89 N.W. 691). The corresponding section of the old Constitution differed in substance but slightly from the present one. This is not the case with municipal courts. They are not created by the Constitution, but only authorized and permitted. They derive all of their powers from the legislature. *Nichols v. Judge of Superior Court, supra.* And the legislature may give them large or limited powers. In either case they are still municipal courts, and belong to that classification. They are not courts of 'general jurisdiction,' in the sense in which that term is applied to circuit courts. Their nature is defined, and the source of their power is stated, in *Covell v. Treasurer of Kent County*, 36 Mich. 332, where this court said:

" 'The court also thinks that under the Constitution it was competent to establish the superior court. The Constitution, it is true, declares that "the judicial power is vested in one Supreme Court, in circuit courts,

in probate courts and in justices of the peace." But it also in the same section declares that "municipal courts of civil and criminal jurisdiction may be established by the legislature in cities." Article 6, §1. This is a plain reservation to the legislature of the power to carve out of the judicial power vested in the other courts named such authority as it would be proper to confer upon city courts, and to create such courts for its exercise. Where that is done, the legislature must determine the extent of the authority to be given the municipal courts, subject to the restriction that it must not exceed that which can properly pertain to a municipal court.' "

The reasoning of the Court in *Dunham* was followed by the Court in *Mooney v. Unemployment Compensation Commission,* 336 Mich. 344, 352, in differentiating between the jurisdiction vested in the circuit and Superior Courts as regards appeals from the unemployment compensation commission.

Consistent with those decisions, the Michigan court by either unanimous or majority opinion has likewise held that inasmuch as the superior court of Grand Rapids is not a circuit court, nor petitioner as the judge thereof a circuit judge, he would not come within the exception in Article XVI, Section 3, against increasing his salary following election, and, therefore, he was not entitled to receive during his current term an increase in salary resulting from an act adopted by the legislature after his election. As above noted, the series of litigation between petitioner and the state officials involving this issue has reached the Michigan Supreme Court on three occasions.

Petitioner was re-elected as judge for a six-year term commencing on May 1, 1953. By Act 155, PA 1954, effective

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August 13, 1954, the salary of circuit judges was increased from $9,000 to $12,000 per annum. In *Taylor vs. Auditor General,* 342 Mich 265, he sought mandamus to require the payment to him of a salary in accordance with the increased rate specified by Act 155. The suit was defended upon the ground that the payment of the increased salary was prohibited by the above quoted provisions of Article XVI, Section 3, of the Constitution. Plaintiff, however, contended that he was not relying upon Act 155 by which the salary payable to circuit judges was fixed, but rather upon section 6 of Act 49, PA 1875, the superior court act, which section was last amended by Act 275, PA 1949. The Supreme Court in denying issuance of the writ of mandamus by reason of such constitutional bar, stated at page 267, 268:

> "But the 1949 act makes no provision for an increase of salaries of superior court judges during term. If it should be so construed, it would run counter to the inhibition in article 16, §3 * * *."

and concluded at page 269:

> "The provision of the Constitution is clear. The legislature cannot fix plaintiff's salary by reference and thus circumvent the express constitutional inhibition against the increase of plaintiff's salary during term. He is not a circuit judge, does not come within the plainly worded exception to the constitutional inhibition, and his salary cannot be increased during term."

Shortly prior to the end of his last term of office as judge of the superior court of Grand Rapids, petitioner instituted the case at bar in the court of claims for the State of Michigan to recover the difference between the salary paid to circuit judges and that received by petitioner

during the period from January 10, 1942 to May 1, 1959. Respondents as defendants filed motion to dismiss the action and at the outset of the hearing thereon petitioner amended his pleadings to strike the ad damnum clause and insert in lieu thereof a prayer for declaration of rights under the statute. Defendants were permitted to amend their motion by inserting the additional ground that "the court of claims does not have jurisdiction for declaration of rights." The court of claims granted the motion to dismiss basing its decision upon the last mentioned ground. Appeal therefrom resulted in *Taylor vs. Auditor General*, 360 Mich 146. No federal question had been raised by the pleadings. The majority opinion, written by Justice Talbot Smith, and concurred in by Chief Justice Dethmers and Justices Carr, Edwards and Souris, affirmed the holding of the court of claims based upon lack of jurisdiction, and also answered the claimed denial of equal protection of law in violation of the 14th Amendment of the Federal Constitution, which issue was raised by Mr. Justice Black in his dissenting opinion. Justices Kelly and Kavanagh concurred in affirmance restricting their opinion to the lack of jurisdiction of the court of claims to render declaratory judgments. The majority and dissenting opinions in that appeal set forth the views of the members of the court upon the issue raised by petitioner in seeking certiorari in the case at bar. We therefore quote from that portion of the majority opinion commencing at page 152:

> "The opinion of Mr. Justice BLACK, we note in closing, applies a theory plaintiff expressly disavowed to a constitutional argument plaintiff did not make to invest the court of claims with a jurisdiction it does not have. All of this is directed to the position that public officials' constitutional invulnerability to changes in salaries during their terms of office somehow or other offends the equal protection clause of the Con-

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stitution. Such conclusion is totally unsupported by applicable precedent and completely oblivous to the reasons for the adoption of the constitutional provision respecting salary stability.

"We are constrained to observe that it is with considerable reluctance that we enter upon the discussion of any legal issue so intimately integrated with our own welfare as the principles applicable to the increase or reduction of judges' salaries. We share the feeling of the United States supreme court expressed in *Evans v. Gore,* 253 US 245 (40 S Ct 550, 64 L ed 887, 11 ALR 519), wherein the court prefaced its holding, in a case involving taxation of judges' salaries, with these words: 'Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us. * * * But jurisdiction of the present case cannot be declined or renounced.' Here, however, the constitutional question has been intruded with the case wholly needlessly. The court of claims has no jurisdiction to render the declaratory judgment prayed, and, if it had, the most serious questions would arise as to how many times this plaintiff may litigate what is essentially the same question, namely, his salary claims.

"We do not rule upon the position that the superior court of Grand Rapids is a circuit court and the judge thereof a circuit judge. The point was neither relied upon nor briefed by either party to this litigation. In fact we find in plaintiff's brief in this case, and in his prior case seeking salary adjustment, a repudiation and disavowal of such argument, for reasons not obscure. The point had been squarely ruled upon and properly rejected in *Dunham v. Tilma,* 191 Mich 688.

"The plaintiff, then, by his own admission, is not, and does not claim to be, a circuit judge. In this posture of the case we did not consider, nor did any party brief to us, the question of whether or not plaintiff's salary deficiency if a circuit judge, and as a circuit judge, which he was not, when compared with the salary of a 'nearby' circuit judge, involved either a denial of plaintiff's right to equal protection under the Fourteenth Amendment of the Constitution of the United States or the Constitution of this State. Even had the question been before us, however, it would not have been ruled upon under the view we have taken as to the jurisdiction of the court of claims, for few principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort. Yet, as we noted, since such constitutional issue has been intruded into the case, however gratuitously, further discussion is in order lest our silence be construed as acquiescence in the propositions asserted with respect thereto.

"The adoption of the original constitutional clauses respecting changes in salaries of public officials during their terms of office resulted from interference with the independence of the judiciary through the power of the purse during Revolutionary times. This was one of the principal causes of complaint in this era. The Declaration of Independence itself, setting forth the tyrannies of the English king, asserted that: 'He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.' As a result most State constitutions, as well as the Federal, contain provisions seeking to protect judicial, or, in some cases, all public

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officials' salaries from alteration, in one form or another, by the legislatures.

"Thus we have, in this State, a constitutional provision forbidding the increase, except for 'circuit judges,' or the decrease, of the salaries of public officers after their election or appointment. Such a provision must inevitably result, in event of salary increases, in subsequent salary differences between judges, other than circuit judges, elected for non-simultaneous terms. There is no doubt, then, that an actual inequality as to salary may exist between those occupying the same office and doing the same work. But is this an unconstitutional inequality, that is to say, an inequality offensive to constitutional principles? That will depend upon the reason and purpose of the provision creating the inequality. Here the constitutional draftsmen must weigh the actual inequality conceded to exist at times against the evils conceivably attendant upon a lack of such provision. The purpose of such provisions, according to Alexander Hamilton, was to restrict the power of the legislature, so that it could 'neither weaken [the public officer's] fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice.' Whether such provisions outweigh considerations of arguable injustice to public officials elected for long terms has been a matter of debate, as has the extent or severity of the clause forbidding change.

"But the debate, for us, has been resolved. The constitutional provision against raising or lowering salaries is, as we have noted, a common feature of many State constitutions, including that of our State, as well as the Federal. These provisions have been

> a part of the several constitutions since earliest times. They have been construed again and again, as reference to any standard digest will disclose. The weakness of the novel position asserted is best demonstrated by the fact that he who asserts it, and who thus has the burden of establishing it, does not cite to us a single applicable case wherein it has been held that judges performing like functions must receive the same salaries, even though the receipt thereof must involve an increase during the term of office, in the teeth of a constitutional provision to the contrary."

Following the return of the case to the court of claims, petitioner again amended his pleading to strike the prayer for declaratory judgment and reinsert the ad damnum clause. Answer was filed raising various defenses, including res judicata and statute of limitations. Both parties moved for judgment upon the pleadings and judgment in favor of plaintiff was entered in the court of claims, which was reversed by the Michigan Supreme Court in *Taylor vs. Auditor General*, 367 Mich 265. Chief Justice Carr wrote the majority opinion with Justices Dethmers, Kelly and Souris concurring. The majority opinion reviewed prior decisions of the Michigan court holding the superior court of Grand Rapids to be a municipal rather than a circuit court, and the judge of the court a municipal judge rather than a circuit judge. The court rejected petitioner's contention that "the superior court of Grand Rapids may be regarded as a circuit court and the judge thereof classified as a circuit judge within the meaning of Article XVI, Section 3 of the State Constitution." The opinion emphasized the distinction that circuit courts are vested by the Constitution[3] with jurisdiction and powers

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[3] 1908 Michigan Constitution, Article VII, Sections 8-12.

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of which the court may not be divested by legislative action, while the extent of the jurisdiction and powers of the superior court is prescribed by and subject to legislative action.

The court further noted at pp 268-9, that prior to January 1, 1909, the effective date of the 1908 Constitution, the legislature was barred from increasing the salary during their current terms of office of either circuit judges or the judge of the superior court of Grand Rapids. The opinion reasoned that had the framers of the 1908 Constitution intended to include the judge of the superior court with circuit judges within the exception to Article XVI, Section 3, specific reference would have been made, and absent any such reference there was "no basis for any inference that an unexpressed inclusion was intended." Justice Black with Justice Kavanagh concurring, wrote a dissenting opinion. Justices Adams and Otis Smith did not sit. Neither the majority nor dissenting opinion make any reference to the 14th Amendment or claimed violation of its equal protection clause. Apparently, insofar as the Michigan court is concerned, that issue was settled by its prior decision in *Taylor vs. Auditor General,* 360 Mich 146. Instead the two opinions dealt with the issue as to whether payment of petitioner's salary during his current term upon the basis of the increased annual amount payable to circuit judges was barred by Article XVI, Section 3, of the Michigan Constitution. In order that there be no misunderstanding as to respondents' position on that issue, we point out the following distinction which respondents have made throughout this series of litigation:

> A public officer is entitled to the benefit of an increase in salary during his current term resulting automatically from fluctuation of population or other factors in accordance with a predetermined formula prescribed by a salary-fixing body prior to his election. He is not

entitled, however, during his current term to receive such an increase resulting from legislative action taken following his election, even though such action is directed to a second act by which his salary is measured.

Thus, the decision in *Taylor vs. Auditor General*, 367 Mich 256, review of which by this court is sought by petitioner, dealt solely with the issue of the construction and application of Article XVI, Section 3, of the Michigan Constitution, rather than with the denial of equal protection of the law. Thus, it might well be contended that no federal question was properly presented. However, that question having been considered by the Michigan Supreme Court in its prior decision in 360 Mich 146, and thereafter raised by amendment to petitioner's pleadings, we prefer to base our opposition to the issuance of this court's writ of certiorari upon the ground that no substantial federal question is presented.

Petitioner's contention that he has been deprived of equal protection of the law is based upon the construction placed upon the exception of "circuit judges" from the bar of Article XVI, Section 3, of the Michigan Constitution against increasing the salary of public officers after election or appointment so as to exclude petitioner as judge of the superior court of Grand Rapids from the benefit thereof. Such contention necessarily challenges the basis for the classification adopted.

Article XVI, Section 3, of the Michigan Constitution has never been amended since the adoption of the Constitution in 1908. That constitution was drafted by a Constitutional Convention. As stated in the Debates of the Constitutional Convention of 1907-08, the pertinent portions of which are set forth at length as Appendix A of this brief, the consider-

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ations which prompted the exception of circuit judges from the prohibition against increasing the salary of public officers following election were:

1. Circuit judges are elected for the longest term of any officer, aside from nonsalaried members of the governing board of certain educational institutions, *the term of which is fixed by the constitution.* Presumably, it was felt that the salary fixing bodies should not be barred during their 6-year term from taking action to increase the salary payable to circuit judges.

2. Under the 1908 Constitution (Article VII, Section 12), as distinguished from the 1850 Constitution, each county in the state would be at liberty to augment the state salary. The delegates recognized that the board of supervisors of counties not previously permitted to vote a judge a county salary should not be limited to a period between the effective date of the constitution and the succeeding election of circuit judges within which to take such action.

3. The fact that a substantial number of circuit judges served in circuits each of which were composed of several counties and as a practical matter it would be difficult to obtain action by the board of supervisors of each of those counties prior to each election of the circuit judge of that circuit.

No argument is required to demonstrate that none of these considerations is applicable to the judge of the Superior Court of Grand Rapids.

We suggest that the foregoing considerations present a reasonable basis for the classification adopted by the framers of the Michigan Constitution in excepting circuit judges from the prohibition of Article XVI, Section 3,

against increasing the salaries of public officers following their election. Further, that the construction placed upon such exception by the Michigan Supreme Court so as to exclude the judge of the superior court of Grand Rapids therefrom does not result in invidious discrimination violative of the equal protection clause of the 14th Amendment. We urge, therefore, that the Michigan Supreme Court was correct in its majority opinion in *Taylor vs. Auditor General*, 360 Mich 146, 152-156, in denying petitioner's contention in that regard.

Since the issuance of the last cited opinion, a somewhat similar issue has been litigated in the federal courts. In *Kavanagh, et al, vs. Brown, et al*, 206 F Supp 479, two members of the Michigan Supreme Court brought an action in the federal district court contending that Article XVI, Section 3, of the Michigan Constitution was violative of the equal protection clause in that application thereof resulted in the payment of their salaries at a lesser annual rate than that paid to other members of the court who had commenced serving their last term thereon since the effective date of the amendatory statute providing for an increase in the annual salaries of the members of the court. Opinion was rendered by a three-judge court, and after citing various decisions of this court in cases in which it was claimed that statutes resulting in certain inequalities violated the equal protection clause, the opinion concluded at page 485:

> "• • • Our function is to apply the law as laid down by the United States Supreme Court. We are convinced that according to its precepts we may not here declare Article 16, § 3, to be violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. 'It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitu-

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tionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.' *Metropolitan Co. v. Brownell,* 294 U.S. 580, 584, 55 S. Ct. 538, 540 (1935). We are not convinced that an apparently reasonable basis for the alleged discrimination does not exist, or that the statutory (constitutional) discrimination is invidious. We are unable to say that this provision does not provide equal protection of the laws."

The resulting judgment was affirmed on motion by this court. *Kavanagh, et al vs. Brown, Treasurer of Michigan, et al.,* 371 US 35, 9 L ed 2d 112.

We submit that the decision of the Michigan court in the case at bar, as set forth in its opinions in 360 Mich 146 and 367 Mich 256, is supported by the rationale of the following decisions of this court filed on May 29, 1961, in the Sunday Closing Cases:

McGowan v. State of Maryland, 366 US 420;

Two Guys from Harrison-Allentown, Inc. v. McGinley District Attorney, 366 US 582;

Braunfeld v. Brown, Commissioner of Police, 366 US 599;

Gallagher, Chief of Police v. Crown Kosher Super Market of Massachusetts, Inc., 336 US 617.

Mr. Justice Frankfurter filed a separate concurring opinion applicable to all four cases. Concerning the challenge that the equal protection clause was violated, he announced applicable law in these words:

> "The restricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause is of long standing. *Lindsley v. Natural Carbonic Gas Co.*, 220 US 61, 78, 79, 55 L ed 369, 377, 378, 31 S Ct 337, Ann Cas 1912C 160. The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality." (366 US 534)

Petitioner has not sustained the burden of demonstrating that invidious discrimination has resulted from the application of Article XVI, Section 3. On the contrary, the provisions thereof are based upon considerations which constitute reasonable basis for the classification adopted.

CONCLUSION

The exception of circuit judges from the constitutional bar against increasing the salary of public officers following election or appointment is based upon considerations which render the resulting classification reasonable and not violative of the equal protection clause.

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None of those considerations is applicable to the judge of he superior court. Thus, the Michigan Constitution in differentiating between circuit judges and judge of the superior court is likewise reasonable and does not deprive petitioner of equal protection in violation of the 14th Amendment.

No substantial federal question is presented. Therefore, he petition for issuance of this court's writ of certiorari hould be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

The following extracts are taken from the Debates of the Michigan Constitutional Convention of 1907-08.

The Committee on Arrangement and Phraseology proposed to the Convention a revised section to be incorporated in the new Constitution and to read as follows:

> "Sec. ..... Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract entered into. Salaries of public officers shall neither be increased nor decreased after their election or appointment."

In the debates that followed on the floor of the Convention it was said:

> "MR. KNOWLES: Mr. President, I move to strike out the entire clause two of this proposal.
>
> "The question being on the motion,
>
> "MR. KNOWLES said: Mr. President and gentlemen of the Convention: I am rather reluctant to suggest any changes to any proposal that comes out from the committee, but it seems to me that this clause if passed will bring about a very serious mistake. 'Salaries of public officers shall neither be increased nor diminished after their election or appointment.'
>
> "By referring to Section 6 of Article VI of the old Constitution, we find that in this article the legislature

is given power for the election of more than one circuit judge in a judicial circuit in which the city of Detroit is situated, in which Saginaw is situated, and in which Grand Rapids is situated, as well as St. Clair county. This provision goes on to state that 'the circuit judge or judges of such circuits, in addition to the salary provided by the Constitution, shall receive from their respective counties such additional salary as may from time to time be fixed and determined by the board of supervisors of said county.' Amendments have been made to this Constitution at various times; in the same section the board of supervisors of each county in the Upper Peninsula and in the counties of Bay, Washtenaw, Ingham, Genesee and Jackson, and the counties in the judicial circuit in which the county of Isabella is or may be situated, have this same provision.

"The people of the state considered it of sufficient importance to amend the Constitution in all of these cases and give the judges additional salaries so that at the present time we have in the state of Michigan twenty-three circuit judges who are receiving additional salaries, I mean over and above the twenty-five hundred dollars provided for in this Constitution. It seems to me that if this clause two is adopted it will interfere with additional salaries being paid to judges. The proposal which has been reported today by the Judiciary Committee, as a recommendation of the alteration of Section 6 Article VI for the new Constitution will provide that the legislature may sanction the election of more than one circuit judge in any judicial circuit, and that each circuit judge, in addition to the salary provided by the state, may receive from the respective counties comprising such circuit, such additional salary as may from time to time be determined by the boards of supervisors of said counties. In other words, it

places Section 6 Article VI in such a way that if at any time a judge should receive an additional salary, as twenty-three of our judges do now receive, the board of supervisors may vote this extra compensation without an amendment to the Constitution. If that is to be a provision in the new Constitution, certainly then clause two which states that 'Salaries of public officers shall neither be increased nor diminished after their election or appointment,' will conflict with it. I make my motion to strike out this clause and leave the proposal in the same condition as it was in the old Constitution, which will allow the boards of supervisors to vote additional salary for circuit judges.

"MR. H. M. CAMPBELL: Mr. President, when the question was asked of me as chairman of the Committee on Legislative Department, as to what the effect would be of this provision upon the proposal which Mr. Knowles has just referred to as being under consideration, I was unable to answer him because I had not then seen either proposal. Since that time, however, I have examined the proposal, and I am inclined to think there might be a serious doubt as to whether it would not conflict with this section if permitted to remain as reported out by the committee. I think that all of us recognize the desirability of permitting the salaries of circuit judges to be increased in the manner in which this proposal which is now before the Judiciary Committee contemplates; and I can see no harm, and in fact I can see a decided advantage in striking out this clause two as proposed by Mr. Knowles in order to accomplish that purpose.

"MR. SNOW: Mr. President, to obviate the difficulty suggested by Mr. Knowles I move as an amendment to the amendment that after the words 'public officers'

there be inserted the words 'except circuit judges.' So that clause two will then read: 'Salaries of public officers, except circuit judges, shall neither be increased nor diminished after their election or appointment.'

"It is seriously contended that this would conflict with the provision that permits circuit judges' salaries to be raised, or additional compensation to be given them, but for that reason clause two ought not to be striken out entirely, because it is a good provision, and if it does conflict with it this would obviate the conflict, and in my opinion it should be passed with the provision inserted.

"THE PRESIDENT: The question is on the amendment of the gentleman from Saginaw (Mr. Snow).

"MR. HEALD: Mr. President and gentlemen of the Convention: I hope that neither the amendment nor the amendment to the amendment will prevail.

"In Kent county the circuit judges receive additional compensation from the board of supervisors. If this clause two remains in the proposal as it is at present, I think you will agree with me that before the circuit judges were elected in Kent county or any other county that the board of supervisors might provide additional compensation for that circuit judge; and then all during his term he would be entitled to receive that compensation instead of feeling that he was subject to the whims of the board of supervisors in the matter of decreasing it, or subject to the whims of the board to have it increased. I see no conflict in that provision with the principle that the board of supervisors before the election of that circuit judge may fix extra compensation for him, and after his election that the board may neither

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decrease it nor increase it. I think that it is a good principle to have in the Constitution, and that neither this amendment nor the amendment to it should prevail.

"MR. BURTON: Mr. President, it seems to me that before the judge is elected or when he is elected that the salary should be fixed, that is the additional salary that he shall receive from the board of supervisors; that he should be content with that salary during the term of his office; he knows what it is, and he knows if this provision stands that he can do no work that will increase his salary; nor can the board of supervisors decrease it. It is very probable that the old provision regarding the election of judges will be entirely remodeled, so if there is any real reason for making an exception in the case of judges it might be done in that provision and not in this.

"There was undoubtedly an effort on the part of the Constitution-makers of 1850 to have this provision incorporated in the Constitution. It is in there in just as plain words as the English language can make it; 'It shall not be lawful hereafter for the legislature to increase or diminish the compensation of any officer during his term of office for which he is elected or appointed,' and it took mighty strong effort on the part of the judges of the supreme court to say that that was a temporary and not a permanent article in this Constitution.

[Note: The Supreme Court had considered this question in the following cases:

The People ex rel. Douvielle v. Manistee Supervisors (1879), 40 Mich. 585;

Hudson v. Attorney General (1907), 150 Mich. 67]

"We in Wayne county have felt the effects of the lack of this provision in the Constitution, in having our officials elected and then after they were elected, after they knew what their salaries were, going to the legislature and getting their salaries increased. There never has been an attempt, so far as I know, to have the salary decreased. I think the provision ought to stand just as it is, just as we have it.

"MR. POST: Mr. President, I agree with the principle as stated by the gentleman from Kent (Mr. Heald) but I have in mind this idea, that perhaps under the recent amendments to the Constitution some of the circuit judges in the circuit, for instance, in which Isabella county is located, have not yet taken advantage of the provisions; and the boards of supervisors of that circuit might desire to fix that salary before another election. In other words the judge of that circuit is now on his term of office, and supposing the board of supervisors at the January session of the board should desire to raise his salary a thousand dollars—they do desire to do it, and in fact are contemplating doing it—but this is only an illustration—they would be barred from doing it under the proposal as it stands at present. That is the only objection I have to it. I think, however, that the argument advanced by the gentleman from Kent (Mr. Heald) is correct; that the proposal is all right as it stands unless it may interfere with some of those circuits to which the right to increase the compensation by the board of supervisors is given under the present Constitution.

"MR. HEALD: Mr. President, if this Constitution is adopted it will not go into effect until a year from the present January, and the board of supervisors would

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have until a year from now, when the Constitution would go into effect, to raise the salary if it wished to.

"MR. WATSON: Mr. President, I hope that the amendment to the amendment will prevail.

"I call attention to the fact that in the Upper Peninsula the judicial circuits are composed of several counties. Now, the greater part of the compensation paid to our circuit judges comes in the nature of extra compensation voted by the boards of supervisors, and if this proposal were to be passed as it stands now, a circuit judge after election would be barred from receiving such extra compensation. In order to get the boards of supervisors of the several counties comprising a judicial circuit to act in unison in providing extra compensation before election of a circuit judge it would be necessary for someone to have it in mind in order to have it done. Now, there is no officer of the judicial circuit that would have any interest in the matter unless it be some volunteer, except the circuit judge himself; and it would put him in rather an unenviable position to go around the circuit seeking to have his compensation fixed. No circuit judge would do it. Furthermore it has been the practice of the boards of supervisors to fix the salaries of officers once every two years, and when these salaries are fixed the compensation of the circuit judge is also fixed. Unless there is a special provision made in this Constitution I do not think the boards of supervisors would feel justified in binding their successors for six years. It therefore would be necessary to except circuit judges in order to give our circuit judges in the Upper Peninsula and other circuit judges permission under the Constitution to enjoy that extra compensation. I do not think any harm will come

from excepting circuit judges from this provision. I sincerely hope that the amendment to the amendment will prevail.

"MR. FYFE: Mr. President, I rise only because of the fear I have that this clause will affect the circuit judges of the state adversely. The term is a long one, —six years—the salary is twenty-five hundred dollars. It is scarcely possible for the judges to take care of their families on that salary and the board of supervisors of a large number of counties have added to the amount. The Judiciary Committee has carried out that idea, and in one of the reports made by that committee it provides that extra compensation may be given to those judges just as the old Constitution provided in the several instances mentioned therein. It is true that when a judge is elected he knows what he is going to get, that he is to draw twenty-five hundred dollars. The term is long, however. Many changes may occur in the business of the circuit during that time. No matter what changes do occur, the salary can neither be increased nor diminished during that period. That circuit judge, as my brother Watson has suggested, would not take upon himself the duty—and it would be a duty really —of interviewing the boards of supervisors and having his salary increased for the next six years. A new judge could not possibly do that. The result would be that the salaries of those judges that are now fixed at twenty-five hundred dollars would remain at that figure for an indefinite number of years. It would simply compel those judges to accept that salary and to continue to take it without any increase upon the part of the board of supervisors, no matter what increase of expense or of business might arise during the term. I think one or the other of the two amendments ought to be carried.

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"MR. HALL: Mr. President, I trust this proposal will pass as it has been reported out.

"Judges, when they accept their office, know what they have to depend upon. I think the idea of the supervisors or anyone else adding to the salary is wrong. Should some one volunteer in behalf of the judge to have the supervisors act in the matter, the judge necessarily feels kindly towards such person, and such a person perhaps living in the circuit might have an undue advantage over others. Let the salary be fixed, and let the judge accept it as it is or allow some one else to take the office.

"MR. FLANNIGAN: Mr. President, we have listened to the objections to a constitutional clause that shall prevent a board of supervisors from either increasing or diminishing the amount of extra compensation of a circuit judge during the term of his office. I am in entire sympathy with the effort to prevent boards of supervisors from disturbing a circuit judge's salary so far as decreasing it is concerned. It is more important that this provision of the Constitution be framed so as to prevent the boards of supervisors from decreasing the salary of the circuit judge as it is to permit an increase of such salary during the term of the office of the judge. That thought has not entered into the provision at all. We do not know how the Judiciary Committee has treated the subject of extra compensation for circuit judges. It would strike me that before we dispose of the proposal now under consideration we ought to see the report of the committee on that subject; and if it is in order I move that this proposal be passed for the day, and in the meantime I suppose we will be able to see the report which is in the hands of the secretary.

"THE PRESIDENT: The motion is in order if the gentleman desires to make it.

"MR. FLANNIGAN: I do make it, Mr. President.

"The question being taken on the motion of Mr. Flannigan, the motion was agreed to."

[Constitutional Debates, Vol. 1, pp. 448, 449, 450, 451]

When the matter came up for consideration on the next day, January 1, 1908, the following transpired:

"THE PRESIDENT: This proposal was read for the second time yesterday, and a motion was made by Mr. Knowles to strike out clause two. Mr. Snow moved to amend by inserting the words 'except circuit judges' after the word 'officers' in line seven. When the matter was passed the question was on the amendment offered by Mr. Snow, the amendment taking precedence of the motion to strike out. The question is on the amendment.

"MR. FLANNIGAN: Mr. President, I desire to offer the following amendment:

"(Read by the secretary): Substitute for clause two, File 113, 'Salaries of public officers except circuit judges shall not be increased, nor shall the salary of any public officer be decreased, after their election or appointment.'

"The question being on the amendment,

"MR. FLANNIGAN said: Mr. President, this substitute has been submitted to both Mr. Knowles and Mr.

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Snow, and is satisfactory to those gentlemen. It is designed, in the substitute, to prevent the supervisors from decreasing the salaries of circuit judges during their term of office.

"THE PRESIDENT: Does the gentleman from Saginaw (Mr. Snow) withdraw his amendment?

"MR. SNOW: Yes, Mr. President, I withdraw my amendment.

"THE PRESIDENT: The gentleman from Charlevoix (Mr. Knowles) does he also withdraw his motion?

"MR. KNOWLES: Yes.

"THE PRESIDENT: The question then is on the substitute offered by the gentleman from Dickinson, Mr. Flannigan.

"MR. BURTON: Mr. President, I cannot understand the necessity for excepting circuit judges from this provision. Are circuit judges any better than anybody else? Is there any reason why a circuit judge should not have his salary fixed the same as any other employe? It has been said here that the circuit judge holds his office for six years, and that is a long period. Why, we hire men all the time for longer periods than six years, and we fix the salaries they are to receive, beforehand—in advance. The matter of their salary is talked over with them, and they agree to it. Is there any reason why circuit judges should not do this as well as any other individual? Before the election takes place practically, which is in November, the boards of supervisors meet, and they fix the salary or the portion of the salary that each county is to pay in excess of the salary

paid by the state to circuit judges, for the succeeding year. When a circuit judge comes up for election the salary has been fixed, and he knows what it will be for the succeeding six years, and he knows that that salary will not be increased during that period, and he knows that it will not and cannot be decreased during that period. A circuit judge is no better than any other employe. If his salary is to fluctuate, to be more this year and less the next, during the entire time that he is in office, he may go to the board of supervisors each year and 'log-roll,' and get the board to increase the salary, and there will be people around him and around the board of supervisors asking the board to increase his salary, and there will thus be an inducement held out to the judge to decide cases in favor of the party who helps him as against the man who does not help him. It is only right that this salary should be fixed in advance, and he should know what it is, and also know that it will not be diminished during his term of office.

"MR. FLANNIGAN: Mr. President, satisfactory reasons why the boards of supervisors should be permitted to increase the salary of a circuit judge during his term of office were given to the Convention yesterday. I got into the discussion of this matter on the question of the authority of the board of supervisors to decrease the salary of a circuit judge during his term of office. I am satisfied they should not have that authority. I have in mind, Mr. President, one instance which occurred within my own knowledge in the state of Michigan. A minister of the gospel who was inclined to enforce the observance of the liquor law walked on the public street of a certain city in this state and looked through the windows of a saloon for the purpose of observing whether or not that saloon was illegally open.

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The proprietor, a great big burly saloon-keeper, saw the minister looking into the window; he walked out of his saloon and assaulted that minister on the street, abusing him most shamefully. He was arrested for assualt with intent to do great bodily harm less than the crime of murder. Unfortunately, (or perhaps it would have made no difference with the result) at any rate the circuit judge could not find evidence enough in the case to warrant his submitting the question to the jury whether or not this man was guilty of assault with intent to do great bodily harm; but that he assaulted the minister and threw him down on the street there was no question; nobody denied that in the case. The jury was finally sent out for the purpose of determining whether or not this saloon-keeper was guilty of assault and battery. The jury was out a long time and was unable to agree. The circuit judge called the jury in, and in very plain language intimated that there could be no question but what this man was guilty of assault and battery. The jury was sent back to their jury room, and after a time returned into court with a verdict of not guilty. Upon that result being announced in the court room the judge said some sharp words to the jury, and not only discharged it from the consideration of that particular case but discharged it for the remainder of the term. Upon that panel there happened to be two or three supervisors, and I believe one or two men who had influence with the board of supervisors. So at the next meeting of the board of supervisors of that county the extra compensation voted by the county to the circuit judge was cut off.

"Now, gentlemen of the Convention, do we wish to leave the constitutional provision in shape to admit of another such attack on any circuit judge?

"THE PRESIDENT: The question is on the substitute offered by the gentleman from Dickinson (Mr. Flannigan).

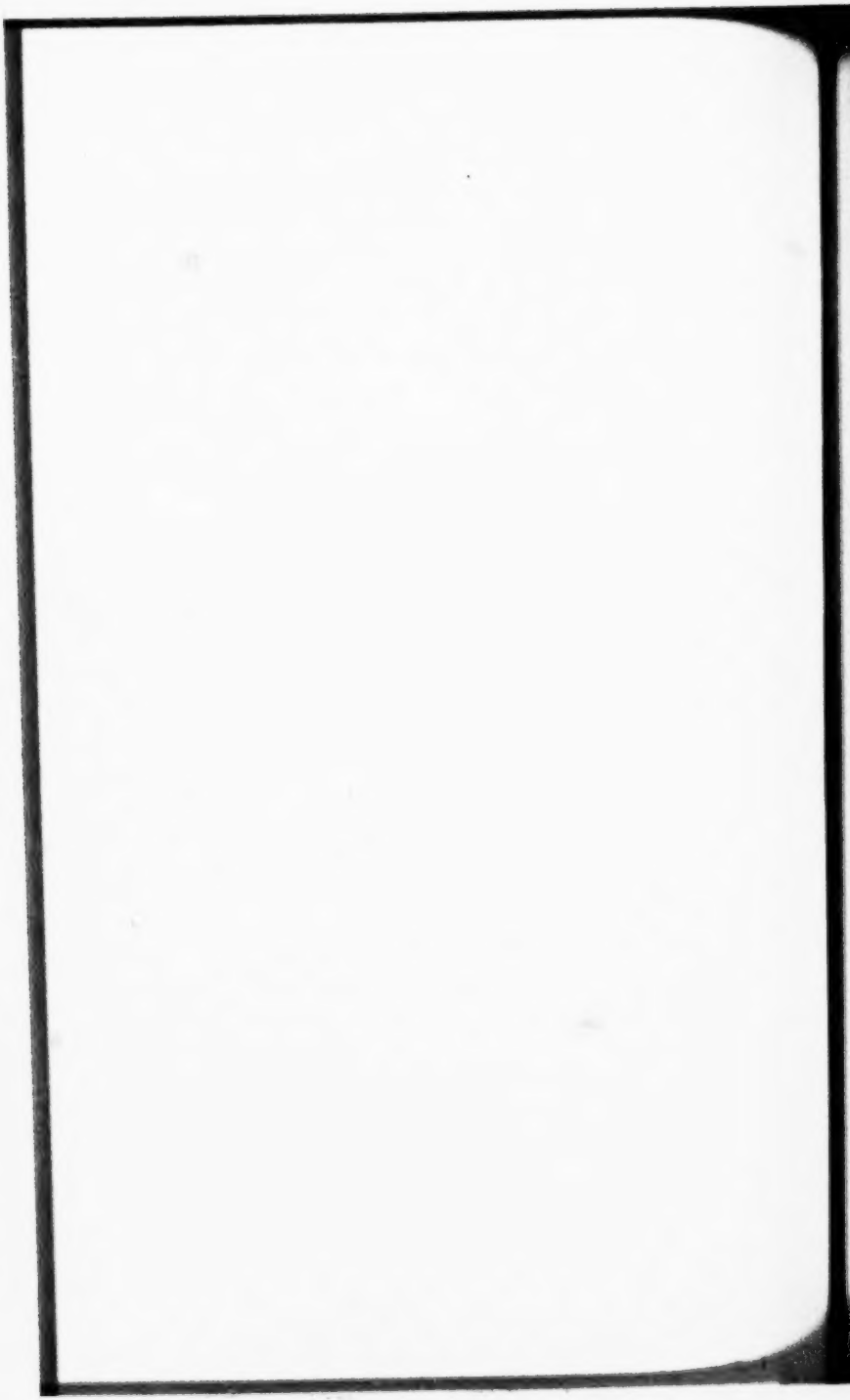
"The question was taken on the substitute and upon a division, yeas 47, nays 29, the substitute was agreed to.

"THE PRESIDENT: The question is on the passage of the proposal as amended.

"The question being taken on the passage of the proposal as amended, there were yeas 72, nays 13 as follows:

" * * * ."

[Constitutional Debates, Vol. 1, pp. 468, 469]



JAN 28 1963

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 668

THADDEUS B. TAYLOR,
Petitioner,

vs.

STATE OF MICHIGAN, et al.,
Respondents.

REPLY OF PETITIONER TO DEFENDANTS' OBJECTIONS TO ISSUING OF A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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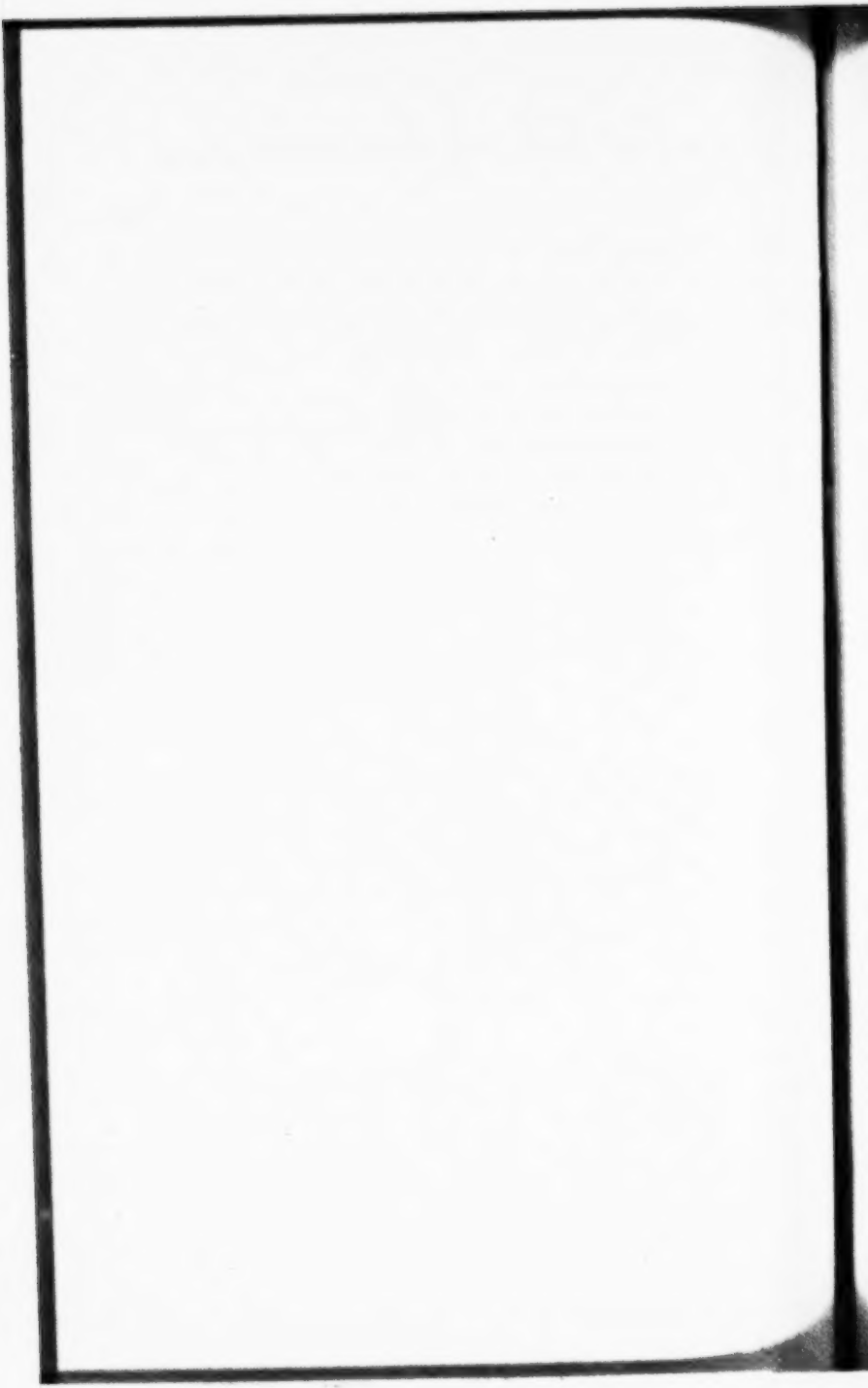

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Respondents.

EPLY OF PETITIONER TO DEFENDANTS' OBJECTIONS TO ISSUING OF A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PRESENTATION

The defendants in the response filed in opposition to he plaintiff's petition have completely and totally failed o discuss a single one of the questions involved, as stated n page 4 of plaintiff's petition. Instead, counsel would etract the attention of the court from the basic constitutional questions therein stated, by proposing a single ountering question which until the filing of the response erein had never before been proposed in this case.

The defendants know that this plaintiff had not herein nd did not in the Michigan Supreme Court, claim invidious discrimination in the *articles of the Michigan Constitution*. The invidious discrimination in this case has been *he refusal of the administrative officers* of the State to ay to the plaintiff the same annual state paid salary s was paid to Circuit Judges; and the judgment of the

Michigan Supreme Court which has *excluded the plaintiff from the benefits granted to a class* of which he was a member and part, all of which has been in opposition to legislative command and authority.

Whether or not such a reasonable basis or state of facts existed as to warrant the classification of Circuit Judges in Article 16 Section 3 of the *Michigan Constitution* is not a question or issue presented in plaintiff's petition to this court; nor was it before the Michigan Supreme Court. Defendants are not called upon to defend or to present reasons for the immunity granted to Circuit Judges in said article. The considerations which may have prompted the immunity, which defendants have stated in three parts on page 23 of their response and objections form no basis for a denial of plaintiff's petition. If it were so, this plaintiff would point out where each of said reasons might equally apply to the judge of the superior court.

The objections of the defendants are not to the questions involved nor to the reasons why the writ should issue, and therefore are without merit.

1. Plaintiff in his petition to this court has made no claim, that the immunity "except circuit judges" in Sec. 3, Art. 16 of the *Michigan Consitution* violates the equal protection provisions of Sec. 1, Art. XIV of the *Constitution of the United States.*

2. Plaintiff has not claimed invidious discrimination in the provisions of the *Michigan Constitution.*

3. Neither the judicial article of *Michigan's 1850 Constitution* (Article 6, Sec. 1) nor the judicial article of *Michigan's 1908 Constitution* (Article 7, Sec. 1) prohibit the Michigan legislature from creating courts of the *same judicial class* as the circuit courts. On the contrary such courts may be created, which shall be inferior only to the Supreme court.

4. In this case we are dealing with the mandatorily required payment of an annual salary by the State of Michigan to the Circuit Judges and the Judge of Superior Court, as distinguished from the *supplemental* and voluntarily contributed salary which the county or counties,

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comprising a judicial circuit, may pay to a circuit judge (or which the city commission of Grand Rapids may voluntarily give to the judge of the Superior Court), *in addition* to the state paid salary.

5. The immunity "except circuit judges" in Sec. 3, Art. 16 of the *Michigan Constitution* was the direct result of the provisions of Sec. 12 of Art. 7 thereof, which is as follows:

Article 7, Sec. 12:

> "Each of the judges of the circuit courts shall receive a salary payable monthly. In addition to the salary paid from the state treasury, each circuit judge may receive from any county in which he regularly holds court such additional salary as may be determined from time to time by the boards of supervisors of any county. In any county where such additional salary is granted it shall be paid at the same rate to all circuit judges regularly holding court therein."

6. Only the Michigan legislature has the power to fix the amount of the annual state paid salary to the judge of superior court and the circuit judges. *That body has declared that their salaries shall be equal.* The "same annual salary" means an equal salary during each and every year of an official term.

There was not a spoken word in the debates of the constitutional convention of 1907 relating to the inclusion of the immunity in Sec. 3, Art. 16, which mentioned or referred to the state paid salary of circuit judges. Every word had reference to the *supplemental salary* which might be granted by a county. It was Sec. 12 of Art. 7, supra, which put "except circuit judges" in Sec. 3 of Art. 16, of the *Michigan 1908 Constitution.*

Complete and full proof of the foregoing statement has been furnished to this court by Appendix "A" of defendants' response "Extracts from the debates of Michigan's Constitutional Convention 1907-1908."

The defendants in the objections filed, do not claim that the plaintiff was not a member and part of the *same*

judicial class as a circuit judge in the administration of law in the State of Michigan; nor do they deny that within their respective jurisdictions circuit courts and the superior court operate and function upon an *equal* basis, with *equal* powers and *concurrent* jurisdiction. They do not challenge the decisions of the Michigan Supreme Court which have declared the Circuit Courts and the Superior Court to be of the *same class.* They say as did the Michigan Supreme Court "You are not a Circuit Judge." That is not the factor which governs decision in this case. It takes more than a difference in names to separate a class. White men are not colored, and colored men are not white. To the present time this court has not made a difference in color of skin, names or the kind of clothes a man wears the basis of denying equal protection of the law, men or judges performing identical work under legislative authority and subject to identical supervision with concurrent jurisdiction, whose judgments and decrees are of equal force and authority are of equal class, requiring each to be treated alike.

There is no provision in the *Michigan Constitution* which forbids payment by the State of Michigan to the judge of the Superior Court of the same annual salary as is paid to a circuit judge. It is not a fact that the salary as "fixed" by legislative act for the Judge of Superior Court was increased during his term of office. The amount ordered to be paid has remained as "fixed" by Sec. 6 of Act 49, *P. A.* 1875, *C. L.* 1948, 727.6; *M. S. A.* 27.3616 viz.: "The same annual salary as may be payable to circuit judges" which said salary (circuit judges) by express constitutional permission may be increased at any time.

Not a dollar of salary can be paid to the Judge of Superior Court by authority of the act fixing the salary of Circuit Judges. Such act does not operate upon the Superior Court. Only by the effect and operative force of Sec. 6 of Act 49, *P. A.* 1875, *C. L.* 1948 727.6; *M. S. A.* 27.3616 is authority conferred upon the state treasurer. He determines the amount in dollars by examining the act which fixes the salary of the circuit judges. Justice Black's opinion is most enlightening on this distinction (pp. 17a-30a of Petitioner's Petition).

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Can there be any question that the legislature in creating and establishing the Superior Court intended that court should be a part and member of the same judicial class in the administration of law within the State of Michigan as the Circuit Courts and Circuit Judges? Do not the provisions of the law, set forth in Petitioner's Appendix D, E, F, G, H, I and J completely disclose such intent?

When and if this court determines as did the trial court (R. 71a, R. 77a), that your petitioner was a member of the same judicial class as a circuit judge in the State of Michigan, the final answer to the questions involved will be given and all other issues however raised will be of no concern.

The defendants on page 25 of their response make reference to the late case of *Kavanaugh et al vs. Brown, Treasurer of Michigan, et al.*, 371 U. S. 35, 9 L. ed. 2nd 112. The members of this court know full well that the facts and questions involved in that case are not comparable to the case of this plaintiff and could never be a basis for a denial of plaintiff's petition.

CONCLUSION

The questions involved which form the basis upon which petitioner has requested this court to issue its writ of certiorari are as stated in the petition. There is no claim of *constitutional* discrimination or that the immunity granted to Circuit Judges violates the Federal constitution. Such a claim would avail nothing for this plaintiff. Petitioner claims he has been discriminated against as a member of a judicial class. These questions, presented by petitioner are *federal questions*, and this court may properly assume jurisdiction for petitioner's protection. To this court plaintiff has hereby made his last appeal to obtain justice. From the judgment of this court once pronounced there is no appeal. For the plaintiff it is "The Alamo." In the letters of Abraham Lincoln we find these words, "I am bound not always to win, but I am always bound to stand by that which is right." And that is the reason thereof this plaintiff has requested this court in the exercise of its judicial discretion to review the judgment

of the Michigan Supreme Court in this case. In no other manner may the irreparable wrong be corrected.

Respectfully submitted,

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